TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 760.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

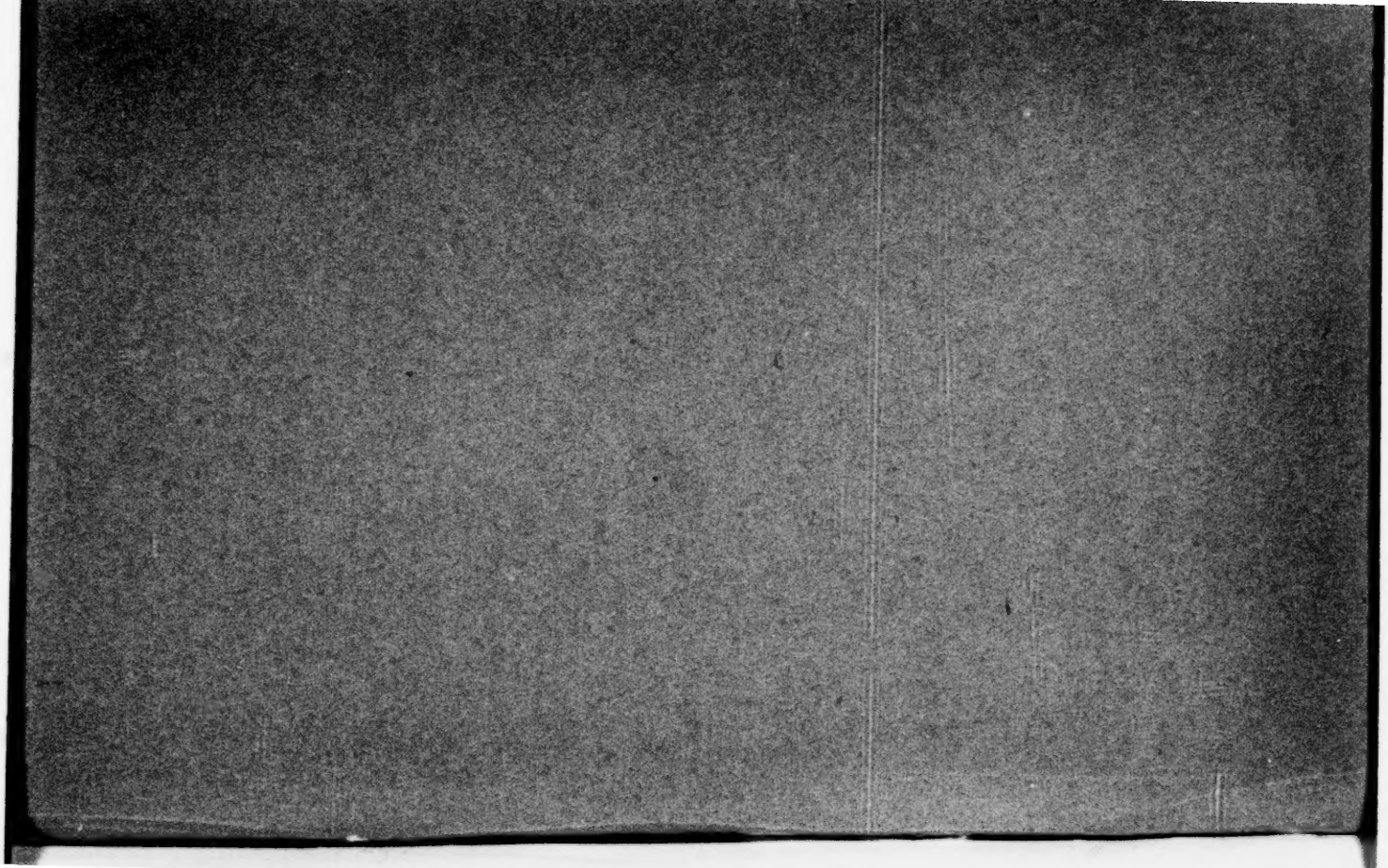
vs.

MARGARET L. TABER, GUARDIAN OF HARRY H. SMALL, GRACE L. SMALL, AND MARGARET G. SMALL, MINORS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 30, 1916.

(25,590)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1916.

1 In the Supreme Court of the United States, October Term, 1916.

No. —.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Defendant in Error.

Præcipe on Writ of Error.

To Honorable J. D. Allen, Clerk of the Supreme Court of Missouri:

Please prepare and submit to the Supreme Court of the United States at Washington a transcript of the record in the above entitled cause, which is an action to review the action, judgment and decision of the Supreme Court of Missouri in an action entitled: "Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Respondent, vs. The Missouri Pacific Railway Company, Appellant, Number 17320," and include in such transcript of the record the following pleadings, records and proceedings had and entered of record in the Supreme Court of the State of Missouri, to-wit:

1. Record entry of the filing in the Supreme Court of the state of Missouri of the transcript of judgment and order granting appeal in said cause, together with copy of such transcript.

2. Record entry in the Supreme Court showing the filing of Appellant's Abstract of the Record in said cause.

3. Pages one (1) to Two Hundred Twenty-two (222) inclusive, of Appellant's said Abstract of the Record.

4. Record entry of the submission of said cause in Division No. One.

2 5. Record entry transferring said cause from Division No. One to Court En Banc.

6. Record entry of judgment in Court En Banc affirming the judgment of the Circuit Court of Jackson County, Missouri.

7. The opinion of Commissioner Brown and record entry of the adoption of said opinion by the Supreme Court.

8. The separate concurring opinion of Judge Faris.

9. The dissenting opinion of Judge Graves.

10. Petition for Writ of Error to the Supreme Court of the United States in the above cause, and endorsements thereon, filed October 13th, 1916.

11. The assignments of error, and endorsements thereon, filed in the above entitled cause on October 13th, 1916.

12. The supersedeas bond, with approval thereof and endorsements thereon, of the Plaintiff in Error, filed October 13th, 1916.

13. The Writ of Error and the order of allowance and endorsement thereon, issued October 13th, 1916.

14. The citation upon said writ of error, and acknowledgment of service thereof and endorsement thereon.

15. This praecipe for transcript on writ of error.

EDWARD J. WHITE,
THOS. HACKNEY AND
MARTIN LYONS.
Attorneys for Plaintiff in Error.

We hereby acknowledge service and receipt of the above praecipe, together with copy of petition for writ of error, copy of writ of error, copy of supersedeas bond, copy of assignments of error, this 17 day of October, 1916.

COWHERD, INGRAHAM & DURHAM.

R. J. INGRAHAM &
L. E. DURHAM,
Attorneys for Defendant in Error.

2½ [Endorsed:] Case No. —. The Mo. Pac. Ry. Company, Plaintiff in Error, vs. Margaret L. Taber, Guardian of Harry H. Small, et al., Defendant in Error. Praecipe on Writ of Error. Edw. J. White, Thos. Hackney & Martin Lyons, Att'ys for Plaintiff in Error. Filed Oct. 13, 1914. J. D. Allen, Clerk.

3 In the Supreme Court of Missouri.

Be It Remembered that on the 1st day of June, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri a certified copy of the Judgment of the Circuit Court of Jackson County, Missouri, and an order granting an appeal therefrom in the case entitled Margaret L. Taber, Guardian, Respondent, (Defendant in Error) against Missouri Pacific Railway Company, Appellant, (Plaintiff in Error) which said judgment and order granting an appeal is in words and figures as follows, to-wit:

Be It Remembered that on the 8th day of the regular March Term, 1912 of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 19th day of March, 1912, the following proceedings were had and made of record before O. H. Lucas Judge of Division 2 in the cause entitled:

No. 53537.

MARGARET L. TABER, Guardian,
vs.
MISSOURI PACIFIC RAILWAY COMPANY.

Now again on this day come the parties hereto, and by their attorneys and the same jury as on yesterday, the trial of this cause is

resumed by the Court, and after the evidence in the cause is concluded the reading of the instructions of the Court, and the arguments of the counsel for the respective parties, the jury retire to its room and after due deliberation return into Court the following verdict, to-wit:

"We the jury find for the plaintiff and assess her damages at the sum of ($8000.00).

Aug. Landwehrkamp, Foreman. William Refiner, Frank W. Turner, J. H. Menn, James L. Godsoe, P. N. Tally, R. R. Maupin, Guy Holtsclaw, Lloyd W. Swearingin, J. H. Sullivan."

4 Wherefor- it is ordered and adjudged by the Court, that the plaintiff, Margaret L. Taber—Guardian, have and recover of and from the defendant The Missouri Pacific Railway Company the sum of Eight Thousand ($8,000.00) Dollars, together with all costs herein and that execution issue therefor.

9th Day, May Term, Wednesday, May 22nd, 1912.

No. 53537.

MARGARET L. TABER
vs.
MISSOURI PACIFIC RAILWAY COMPANY.

Now on this day comes the defendant by attorney and files application and affidavit for an appeal from the judgment and decision of this Court, and the Court grants to the defendant an appeal to the Supreme Court of this State and allows the defendant until on or before the second day of September, 1912, in which to present and file its bill of exceptions herein, and the Court upon the application of the defendant fixes the amount of the appeal bond to be filed herein at the sum of ($17,000.00). The defendant thereupon files its appeal bond in the sum of ($17,000.00), with the Missouri Pacific Railway Company, as principal and J. W. Perry and H. T. Abernathy as surety thereon, the aforesaid appeal bond is by the Court approved.

STATE OF MISSOURI,
County of Jackson, ss:

I, James B. Shoemaker, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the Judgment and Order allowing appeal in the cause entitled Margaret L. Taber, Guardian plaintiff against Missouri Pacific Railway Company defendant as the same appears of record in my office in record 206; pages 448 and 520.

In Witness whereof, I hereunto set my hand and affix the seal of said Circuit Court, at office in Kansas City, this 23 day of May, A. D. 1912.

[SEAL.] JAMES B. SHOEMAKER, *Clerk.*
R. B. BOYLE, *Deputy.*

5 In the Supreme Court of Missouri.

And thereafter, to-wit, on March 22nd, 1915, Appellant filed its Abstract of the Record in said cause, which said Abstract is in words and figures as follows:

In the Supreme Court of Missouri, October Term, 1914.

Number 17320.

MARGARET L. TABER, Guardian, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appellant's Abstract of the Record.

This suit was begun in the Circuit Court of Jackson County, Missouri, at Kansas City, on September 21st, 1910. The plaintiff's petition is as follows:

Petition.

Plaintiff for cause of action states that she is the duly appointed, qualified and acting guardian of the person and curator of the estate of Harry H., Grace L., and Margaret G. Small, who are the minor children of Charles H. Small, deceased. That plaintiff is the
6 grandmother of said minor children and was appointed as their guardian by the Probate Court of Jackson County, Missouri, on the — day of ——, 1910, and brings this suit as their guardian.

Plaintiff further states that on the 9th day of April, 1910, said Charles H. Small was employed by defendant as a switchman and was working as a member of a switching crew under the immediate supervision of one of defendant's switch foremen in what is known as the East Bottoms switch yards, in Kansas City, Missouri; that said yards are located near the intersection of Topping and Garner Avenues being about 1200 feet west of Topping Avenue and about 1000 feet south of Garner Avenue in said city. That as a part of the equipment of said switching crew, defendant furnished and employed a locomotive switch engine run, conducted and managed by defendant, its agents, servants and employees, and the movement of which was also under the supervision of said switch foreman. That it was the duty of said Charles H. Small as such switchman to aid in cutting up and making up trains, switching cars, coupling cars, etc., in said yards.

Plaintiff further states that about 8:45 o'clock in the forenoon of said last named day the said switching crew, of which said Charles H. Small was then and there a member, while pursuing their regular line of duty, were engaged in switching cars back and forth on what is known as track No. 5 in said switch yards and thereby switching

out the loaded cars from a mixed train of loaded and empty
7 cars that stood on said track No. 5 and returning the empty cars to the original position on said track.

Plaintiff states that the grade of said track 5 slopes very gently down toward the west so that cars when given a slight impetus will travel westward by force of gravity on said track. That in the performance of said work under the supervision of said foreman two of said cars had been by the direction of said foreman returned to said track 5 as aforesaid and were moving slowly by gravity down said track; that while said two cars were thus moving along, said foreman directed said Charles H. Small by signal to prepare to couple them up with six other empty cars which were then attached to said switch engine on another track and were being brought back by said engine to said track 5 under the direction of said foreman. That said foreman communicated to said Charles H. Small by signal that the said six cars would be "shoved in" on said track 5 for the purpose of coupling, that is, would be brought in attached to said engine and under the control of said engine and not cut loose and allowed to run down by gravitation.

Plaintiff states that said Charles H. Small, in obedience to said direction as said foreman and in the exercise of his duty as switchman immediately proceeded to prepare to make the coupling with said two cars which were still moving along as aforesaid; that the drawhead, or coupling device, of the east or rear car being the one to which the coupling was to be made, was out of repair and not in working order so that it was necessary for the said Charles H.
8 Small in obedience to said foreman, and in the line of his duty as said switchman, to walk (and he did walk) along on the said track following just behind said car as it moved along for the purpose of adjusting said coupling device in order to make said coupling.

Plaintiff states that while said Chas. H. Small was so endeavoring to adjust said coupling device, the defendant negligently and carelessly detached, or caused to be detached, the said six cars from the engine aforesaid and shunted them in on said track 5 and negligently and carele sly allowed and permitted said six cars to run down said track without any warning to said Chas. H. Small and contrary to the signal information heretofore given him by said foreman. That said Chas. H. Small had no knowledge of the approach of said cars from his rear while he with his back turned, was endeavoring to adjust the coupling device as aforesaid. That said six cars by reason of the negligence and careles-ness as aforesaid of defendant were left to gravitate down upon the said Charles H. Small while he was in the position aforesaid and crushed him against the said draw head cars which he was following and thereby killed him almost instantly. That it was the duty of defendant, its officers, agents and employees to warn said Charles H. Small of the approach of said six cars in the manner aforesaid. That it was the custom in coupling cars that were "shoved in" to keep them attached to and under the control of the switch engine as aforesaid and not to make the coupling until

signalled by the switchman actually making same that he was ready and in the clear.

9 Plaintiff states that said Chas. H. Small relied upon said custom and manner of doing said work. That defendant failed and neglected to observe such custom at the time aforesaid and failed and neglected to warn said Chas. H. Small of the approach of the said six cars or to communicate to him that same would be "shunted in" and allowed to run without the engine being attached; that such negligence and carelessness of defendant resulted in the death of said Chas. H. Small.

Plaintiff further states that at the time of his death, the said Chas. H. Small was an unmarried man about 42 years of age. That his wife had died on or about the 10th day of May, 1909, and that he had left surviving him three minor children, Harry H., aged 15, Grace L., aged 14 and Margaret G., aged 8 years.

Wherefore plaintiff says a cause of action has accrued to plaintiff as guardian of said minor children and that the amount which plaintiff is entitled to recover is $10000.

Wherefore plaintiff prays judgment against defendant for ten thousand ($10000) Dollars and costs.

L. E. DURHAM,
Attorney for Plaintiff.

On October 12th, 1910, the defendant filed the following demurrer to said petition:

Demurrer.

Now comes defendant and demurs to plaintiff's petition in the above entitled cause, and, for ground of demurrer, says that said petition does not state facts sufficient to constitute a cause of

10 action against this defendant.

ELIJAH ROBINSON,
Attorney for Defendant.

Said demurrer having been overruled, on May 22nd, 1911, the defendant filed the following amended answer to said petition:

Defendant's Amended Answer.

Defendant, for its amended answer to the petition of the plaintiff, denies that Margaret L. Taber is the duly appointed guardian for Harry H., Grace L. and Margaret G. Small, as alleged in the petition.

Further answering, the defendant denies each and every allegation in the plaintiff's petition contained.

Further answering, the defendant denies that the father of the plaintiffs, Charles H. Small, was killed by reason of the neglect and carelessness of the defendant or of its agents or employees, but the defendant states that the injury and death of the said Charles H. Small was due to his own carelessness and negligence

directly contributing thereto and for which the defendant was in no way responsible.

Further answering, the defendant states that the injury and death of said Charles H. Small was due to a risk incident to the employment in which he was engaged by the defendant. That said Charles H. Small at the time he entered into the service of the defendant as a switchman, in consideration of the employment and wages to be paid him by the defendant, by his written
11 contract and agreement duly executed by the said Charles H. Small, undertook and agreed in consideration of the salary paid him by the defendant to assume the risk of injuries while engaged in coupling cars in the defendant's yard as one of the risks incident to the service in which he was engaged. That the defendant was in no way responsible for the death of the said Charles H. Small, but his injury and death was due to an accident which could not have been avoided by the exercise of reasonable care on the part of the defendant and the injury and death of the said Charles H. Small was due to a risk which he expressly contracted in writing to assume for himself at the time of entering into the defendant's employment. That said contract of employment so entered into by the said Charles H. Small, constituted and was a valid subsisting contract which could not be impaired by any law or judgment or decision of any court subsequent to the execution of said contract. That any recovery by the plaintiff in this case would impair the obligation of said contract in violation of the provisions of Section 15, Article 2 of the constitution of Missouri.

Wherefore, having fully answered, the defendant asks to be discharged and to have and recover its costs.

MARTIN LYONS,
EDW. J. WHITE,
Attorneys for Defendant.

12 On March 18th, 1912, the plaintiff filed the following reply to said amended answer:

Reply.

Comes now plaintiff and for reply to defendant's amended answer filed herein, denies each and every allegation of new matter in said answer contained.

COWHERD, INGRAHAM, DURHAM & MORSE, *Attorneys for Plaintiff.*

Abstract of Record Entries.

The cause was tried before a jury and the trial was concluded upon March 19th, 1912, and a verdict was returned in favor of plaintiff and against the defendant in the sum of Eight Thousand Dollars, signed by ten jurymen, and judgment was duly entered thereon against said defendant on said date.

During the same term of the trial court, and within four days thereafter, on Friday, March 22nd, 1912, same being the eleventh day of the March Term, 1912, of said court, the defendant filed its motion for a new trial in said cause, and upon the same day the defendant filed its motion in arrest of judgment in said cause.

And afterwards, to-wit, on Saturday, May 18th, 1912, same being the 6th day of the May Term of said court, the defendant's motion for a new trial in said cause was, by the court, overruled, to which action and ruling the defendant then and there duly excepted, and on the same day the defendant's motion in arrest of judgment was also overruled, to which action the defendant also duly excepted.

13 And afterwards, to-wit, on Wednesday, May 22nd, 1912, the same being the 9th day of the May Term, 1912, of said court, the defendant filed its application and affidavit for an appeal from the judgment and decision of the court in said cause, and the court, by an order duly entered of record, granted the defendant an appeal in said cause to the Supreme Court of Missouri.

And upon the same day by an order duly entered of record, the court allowed the defendant until on or before the 2nd day of September, 1912, in which to present and file its bill of exceptions.

And afterwards, to-wit, on Wednesday, June 26th, 1912, same being the 38th day of the May Term, 1912, of said court, and within the time so granted the defendant by an order duly entered of record, the court, for good cause shown, extended the time within which to file the bill of exceptions in said cause until on or before the 4th day of November, 1912.

And afterwards, to-wit, on Wednesday, October 30th, 1912, within the time heretofore given the defendant to file its said bill of exceptions, same being the 40th day of the September Term, 1912, of said court, for good cause shown, the court, by an order duly entered of record, extended the time heretofore given the defendant in which to present and file its bill of exceptions until on or before the 2nd day of December, 1912.

And upon the 18th day of November, 1912, and within the time previously allowed by said court, within which to file said bill of exceptions, the defendant's bill of exceptions in said cause

14 was duly signed by Hon. O. A. Lucas, Judge of Division No. 2 of the Circuit Court of Jackson County, Missouri, and the same was filed by the clerk of said court, and duly endorsed by him, filed as of said date, as follows:

"Filed, Division No. 2, Nov. 18th, 1912. James B. Shoemaker, Clerk, by Thos. W. McGuire, D. C."

And upon the same day of said court, the court made and caused to be entered of record in said cause a finding that said bill of exceptions had been duly presented to the court and was found to be correct and that the same had been signed, sealed, allowed and made a part of the record in said cause.

And said bill of exceptions, so signed and allowed in said cause was as follows:

Bill of Exceptions.

Be it remembered that on Monday, the 18th day of March, 1912, and at the March Term, 1912, of said Circuit Court, this cause coming on for trial before the Hon. O. A. Lucas, Judge of said court, and a jury, duly empaneled and sworn, plaintiff appearing by her attorneys, Cowherd, Ingraham, Durham & Morse, and defendant appearing by its attorneys, White & Lyons, proceedings were had as follows, to-wit:

Witnesses present were duly sworn and placed under the rule.

15 Plaintiff to sustain the issues upon her part offered and introduced evidence as follows, to-wit:

Mrs. Margaret L. Taber, called a- a witness on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Durham:

Mr. White: Before the introduction of any testimony, defendant objects to any evidence under the petition, for the reason that the petition fails to allege facts sufficient to constitute a cause of action, and especially in this, that the petition is based upon a failure to give warning of the movement of the defendant's freight cars in its private railroad yards, as a result of which failure to give warning to the deceased he met his death; and the law in the state of Missouri is that there is no duty to give warning of the movement of cars in a railroad yard; and the only other allegation of negligence is the shunting of the cars, instead of shoving the cars, and the petition alleges on its face that the deceased had notice that the cars were coming, and whether they were shunted or shoved, the fact that he had been given notice by signal that the cars were coming would not constitute negligence.

The court overruled the objection; to which action and ruling of the court defendant then and there at the time duly excepted and still excepts.

Q. State your name to the jury, Mrs. Taber.
A. Margaret L. Taber.
Q. Margaret L. Taber?
A. Yes, sir.
16 Q. Where do you live, Mrs. Taber?
A. 3307 East Thirtieth.
Q. Speak a little louder, so the jury can all hear.
A. 3307 East Thirtieth.
Q. How long have you lived in Kansas City, Missouri?
A. 42 years, most of the time.
Q. Were you acquainted with Charles H. Small?
A. Yes, sir.
Q. How long had you known him?
A. 19 years, I believe.

Q. 19 years?
A. Yes, sir.
Q. What relation, if any, was he to your family?
A. My son-in-law.
Q. He married your daughter, did he?
A. Yes, sir.
Q. What was her name?
A. Lucy Polk Taber.
Q. Is she living?
A. No, sir.
Q. How long has she been dead?
A. Three years, two years last May; she was dead eleven months, a year lacking one month, when Mr. Small was killed.
Q. Mr. Small was killed what day, do you remember?
A. 9th day of April.
Q. What year?
A. 1910.
Q. 1910, now, how long prior to that was it before your daughter, his wife, died?
A. Eleven months.
Q. Had he any wife when he died?
A. No, sir.
Q. He had never married again?
A. No, sir.
Q. And she was his wife when she died, was she?
A. Yes, sir.

Q. I will ask you to tell the jury how many children, if
17 any, Mr. Small had at the time of his death?

A. He had three children.

Q. Give their names and ages.
A. Harry H. Small, 17, and Grace Lucille Small, 16, Margaret Gordyne Small, 10 years old.
Q. You are giving their present ages, are you?
A. Yes, sir; did you want——
Q. You are giving their present ages, no, that is all right, I just want to understand you. These are the children here, are they, Mrs. Taber?
A. Yes, sir.
Q. Did Mr. Small live close to you at the time of his death?
A. No, sir; he lived 209 North Hardesty.
Q. North Hardesty?
A. Yes, sir.
Q. You didn't see him that day, then, before the accident?
A. No, sir; I didn't see him that day.
Q. Do you keep the grandchildren?
A. Yes, sir.
Q. At your house?
A. Yes, sir.
Q. What was Mr. Small's business?
A. He was working in the yards, northeast, the switch yards there.
Q. Working for the Missouri Pacific Railway?

A. Missouri Pacific; yes, sir.

Q. How long, if you know, had he been working there?

A. I do not just know; it wasn't a year, but I don't know just exactly how long, how many months, I don't know exactly how long it was, but a few months.

Q. A few months?

A. Yes, sir.

Q. How long, if you know, had Mr. Small been engaged in working in railroading business?

A. He had worked for the Missouri Pacific from the time he was 18 years old, I believe.

18 Q. In what line of work had he been engaged with the Missouri Pacific?

A. Well, first went to clean cars, I think first, if I am not mistaken, that was before I knew him; then he was a brakeman for the Missouri Pacific and later on conductor on the road, and then he was in the yards the last year or a few months, I don't know just exactly the time.

Q. How long had he been engaged actively, then, in the railroad operation or railroad yards?

A. I think about 20 years, 22, something like that, I can't just remember, I don't know just exactly.

Q. About 20 years?

A. Somewhere like that.

Q. At the time of his death did you see him just prior to the time of his death every few months, did you see him frequently?

A. Well, I saw him once or twice a week; I used to go over to the house, he had no housekeeper, and looked after the house and the children.

Q. The children did not live with you, then?

A. No, sir.

Q. Do you know what salary or wages Mr. Small was earning at that time?

A. Well, somewhere between $75 and $100.

Mr. White: Defendant objects to that as not a proper element of damages in this case.

The court overruled the objection; to which ruling of the court defendant then and there at the time duly excepted.

Q. You say he was earning between $75 and $100 a month?

A. While he was down there in the yards.

Mr. White: I would like to ask counsel whether they are

19 proceeding—they allege here a defective car coupler, as to whether they are proceeding under the common law charge of negligence, or under the penal section. They also allege negligence of the people in charge of the train. Under one of the allegations this would perhaps be competent; I think under the other it would not.

Mr. Durham: We say that it is competent under any allegation. Do you withdraw the objection?

Mr. White: No, I insist on the objection.

Defendant objects and moves to strike out the answer of the witness as to the earning of the deceased, for the reason it is incompetent under the issues involved in this case.

The Court: Objection is overruled; motion will be overruled.

To which action and ruling of the court defendant then and there at the time duly excepted.

Q. Mrs. Taber, have you your letters of guardianship?

A. No, I haven't them, not now.

Q. What is that?

A. I haven't any now, I have sent what I had down there and I have not any here with me.

Q. You have not any here?

A. No, I can get them I suppose, at the court.

Q. I mean the original letters, I want to know where the original letters are, if you have them in your possession?

A. I have not any, just one that I have in my pocketbook here.

Q. I am talking about the letters of guardianship.

A. Well, I have not any; I have to get copies because I
20 had to send them down there to the attorney there for some estate that was left there for the children.

Q. And you have not got them in your control now?

A. I have not got them here with me.

Q. They have never been returned to you?

A. No.

Mr. White: I object to all evidence about the grant of letters and whether or not she has them and what she has done with them, for the reason the letters themselves would be the best evidence.

Mr. Durham: No doubt about that, but the letters themselves would not show what she had done with them.

Mr. White: No, but whether they had been issued.

The Court: He is asking what she has done with the letters.

Mr. White: I make my objection. I object to this evidence because it is not the best evidence; it refers to written letters, the grant of letters by the court, they are not before the court.

Mr. Durham: We will have to introduce certified copies of the letters of guardianship. The purpose of the examination is to show by the witness that the original letters——

The Court: Go on; objection overruled.

To which action and ruling of the court defendant then and there at the time duly excepted.

Q. How old a man was Mr. Small?

A. 42.

Q. At the time of his death 42 years?

A. Yes, sir.

21 Q. How long had he lived in Kansas City, Missouri?

A. I can't tell you how long he lived here.

Q. About how long?

A. Well, from the time he was 15 years old; he was here, I think, when he was 15 years old, they came from West Virginia here.

Defendant's counsel objected.

The Court: She has answered the question.

Q. Mrs. Taber, at the time of his death state whether or not Mr. Small was caring for these children?

A. Yes, sir, he was.

Defendant's counsel objected as immaterial, incompetent, and prejudicial. The court overruled the objection; to which ruling of the court defendant then and there duly excepted.

Q. What is that?

A. I say yes, he was caring for his children to the best of his ability.

Q. Were they living with him at the time?

A. Yes, sir.

Same objection by defendant.

Q. And had they been for some time prior thereto?

A. They had lived there except five weeks, from the time his wife died, they had lived at the house with him.

Cross-examination by Mr. White:

Q. Mrs. Taber, you are the grand-mother of the children who are suing?

A. Yes, sir.

Q. Did you know Mr. Small's signature; you had seen him sign his name?

A. Oh, yes, I know his writing.

Q. You knew his writing. I will ask you if that is his sig-
22 nature to this paper that I hand you?

A. I will have to change my glasses.

Q. Is that Mr. Small's signature to this paper that I hand you?

A. It does not look like it to me.

Q. Doesn't look like it to you?

A. No, sir, it does not; the "H" does not look like his "H."

Q. That is all.

A. It may be.

Q. I will hand you his original application dated Lexington, Missouri, November 7, 1890, witnessed by H. J. Wood, agent, and Charles Walk, and ask you if that is his signature (handing paper to witness)?

A. That looks more like it than the other one.

Q. Do you say that is or is not his signature, Mrs. Taber?

A. The "C" and "Small" looks like his signature, but that "H" does not look like his.

Q. I believe you said you were familiar with his signature?

A. Well, I thought I was.

Q. You say that is not his signature, then, do you?

A. That does not look like his "H," the way he makes the "H." He might have been excited when he wrote it—made that "H," it is possible that it may be.

Q. Are you able to say, madam, from looking at the signature,

whether it is or is not his signature, witnessed by these two gentlemen there?

Mr. Durham: I think the witness has answered that she says it may be.

A. It might possibly be, it might possibly both be his, and yet he may be nervous and not make the "H"—it doesn't look like his "H."

Q. Now, I hand you this one that I first handed you, being
23 his original application dated the 1st day of November, 1909, said statement witnessed by M. J. Goddard. I will ask you to state whether that is or is not his signature, if you are able to state?

A. That looks more like the "H."

Q. The one I handed you last?

A. The "H" looks more like his, but the first I seen does not look like his "H."

Q. You can't tell whether that is his signature?

A. No, I would not swear to it, but that is his "H."

Q. I believe that is all.

Direct examination by Mr. Durham:

Q. One question, Mrs. Taber, that I wanted to ask you. When was it you first learned about Mr. Small's death?

A. I think it was 9:30, or near that time, I couldn't just tell you, it was between 9 and 10 o'clock some woman called me and told me Mr. Small——

Defendant's counsel objected as hearsay.

Q. Don't tell what she said to you. That was on the 9th of April, 1910?

A. Yes, sir.

Mr. White: I object to that. It is asserted that Mr. Small is dead, and when she heard about it first would be incompetent.

Mr. Durham: All right.

Mr. Cowherd: Is it admitted that he was killed on the road in its operation?

Mr. White: The answer admits that he was killed on the road, in the operation of the road, not as alleged in the petition, but he was killed.

Mr. Durham: That is all, Mrs. Taber.

24 Warren C. Kay, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Durham:

Q. State your full name, Mr. Kay.

A. Warren Clifton Kay.

Q. Where do you live, Mr. Kay?

A. 2718 Madison, 2720 Madison.

Q. In Kansas City, Missouri?

A. Kansas City, Missouri.

Q. How long have you lived in Kansas City, Missouri?
A. I believe I moved over here in July last year.
Q. Where did you live previous to that?
A. Independence, Missouri.
Q. How long have you lived or had you lived in Independence, Missouri, when you moved up here?
A. About three years, something like that, two or three years.
Q. Two or three years. What is your business, Mr. Kay?
A. Railroading, yard service.
Q. In the yard service of the railroad. Are you now employed in that line?
A. Yes, sir.
Q. By what company?
A. The Kansas City Terminal.
Q. Kansas City Terminal Railway Company. Where are you employed?
A. Well, I go to work at Twenty-fifth and State Line.
Q. I mean in Kansas City, Missouri.
A. Kansas City, Missouri, yes, sir.
25 Q. How long have you been employed by them?
A. I think I went to work for them last May.
Q. Last May?
A. May or June, the latter part of May or forepart of June.
Q. How long have you been engaged in that line of work?
A. Since 1901, in actual switching service; I have been railroading since 1898, but I have been in actual switching service since 1901.
Q. You began railroading in 1898, you say?
A. Yes sir.
Q. What have you been doing in the switching service; have you been employed as ordinary switchman or in all capacities?
A. All around work running crews, switching cars, helping any kind of yard work that is to do, anything they want done.
Q. Where were you employed April 9, 1910?
A. April 9 I was working for the Missouri Pacific, East Bottoms train yard.
Q. Were you acquainted with Charles H. Small?
A. Why, I worked with him.
Q. You were acquainted with him, then, were you?
A. Yes sir.
Q. How long had you known him?
A. Why, I had probably known him a couple or three months.
Q. When did you work with him?
A. I was working with him on April 9, 1910.
Q. Where and what were you doing, I mean in a general way that line of work?
A. I was switching for the Missouri Pacific in the East Bottom train yard at Kansas City, Missouri.
26 Q. Was he a member of that crew that you were working with?
A. Yes, sir.
Q. What was his position there?

A. Why, he was working in what we call the long field, in the switching service.

Q. The long field?

A. Coupling cars together and lining the long switches; I was working on the short switches.

Q. Who else was a member of the crew besides yourself and him?

A. There was a fellow by the name of Pipes, Irvin Pipes, I believe that is his name, Irvin, he was following the engine, and a fellow by the name of Lonergan was conductor or foreman, and Charles Small and myself were doing the fast work.

Q. Well, did you have a switch engine in the crew?

A. Yes, sir.

Q. Who was the engineer and who was the fireman?

A. The engineer's name was Mills, but I don't know the fireman's name.

Q. There was a fireman, was there?

A. Yes, sir.

Q. How long, now, had you and Mr. Small been associated together in that crew prior to that?

A. Well, sir; I couldn't tell you how long he had been on that crew, he had been there——

Q. Approximately?

A. Probably three or four days, anyway.

Q. Three or four days?

A. Anyway that long on the job; now, further than that I——

Q. How long had you been in that crew?

A. Probably twenty-two months.

27 Q. Twenty-two months.

A. I think I was off of the crew about thirty days once in twenty-two months.

Q. Where had you seen Mr. Small prior to this time he was member of this crew?

A. Why, I saw him going up over there in the West Bottoms, or in the East Bottoms, the west end yard.

Q. Was he working as switchman there in some way?

A. Yes, sir.

Q. In the East Bottoms of the defendant company?

A. Yes, sir.

Q. In the East Bottoms switch yard of the defendant company, how long had you observed him working there in the East Bottoms in the switch yard of the defendant?

A. Well, sir; I don't know how long he had been there; there is always so many men showing up there that a man that is on the regular job hardly ever has time to size up who is working; he had been there quite a while, I suppose three or four months, I guess, before; I wouldn't say that for positive, but I guess he had been there that long anyway.

Q. Describe, Mr. Kay, in your own language the happenings there on April 9, 1910, with reference to the death of Mr. Small, giving the jury and the court an idea of the surroundings and all that you saw and know about it.

Mr. White: We object to that unless the witness states that he saw him at the time that he was struck.

Mr. Durham: That will be withdrawn.

Q. Do you remember the time that Mr. Small was killed?

A. 8:35 in the morning, if I remember.

28 Q. How long had you been at work prior to that time?

A. We go to work at 7 o'clock.

Q. 7 o'clock in the morning?

A. Yes, sir.

Q. Had he been working there from 7 o'clock until the time he was killed?

A. Yes, sir.

Q. Where was he killed?

A. He was killed on track No. 5.

Q. Where?

A. In the East Bottoms train yard.

Q. Just a little louder, Mr. Kay.

A. On track No. 5 in the East Bottoms train yard.

Q. East Bottoms train yard?

A. Yes, sir.

Q. Tell the jury if you saw him when he was killed or when you last saw him before he was killed, if you didn't see him actually killed.

A. We went down track No. 5 and coupled up the drag; and, as I remember it, there was about 25 cars in the drag. I went along with the foreman and helped couple up the drag. Charles helped to couple it up.

Q. This was track No. 5?

A. Track No. 5.

Q. What were you doing, coupling up the cars that were loaded on that track?

A. On that track preparatory to making up a train for the West.

Q. What kind of cars were those, loaded or empty?

A. Well, there were loaded cars and empty cars, too, they was intermediate.

Q. What was your crew doing?

A. We was trying to find out whether there was enough tons in there for the train or not; we was aiming to use everything on that westbound track.

Q. Were you taking the cars that were loaded off of track 5?

29 A. We coupled up the full drag, and there was loads and empties in the drag, so there was probably eleven empties and about fourteen loads, or thereabouts, that would make about twenty-five cars.

Q. What did you do with them?

A. We pulled them out of track 5, we went along and coupled them up, they was probably in five or six pieces in the track, and we coupled them all up, and the foreman figured the tonnage, and just as we was leaving the track assistant yardmaster Neal Flagg came along and asked the foreman how many tons he had; Mr. Lonergan

told him how many tons he had, if I remember correctly there wasn't quite enough for the train and loads.

Q. Never mind about that conversation. I only want to know what you did with those cars there after you had them coupled together?

A. We pulled them up on the lead and switched the empties out, or switched the loads out and threw the empties back to track No. 5.

Q. Now, tell the jury what you mean by the lead; what do you mean by the lead track, I mean describe what you mean by that.

A. The lead track is the outside track; all inside tracks lead off this main lead going down the line; the outside track is always called the lead in railroad yards.

Q. In what direction, now, did that lead or outside track run down there?

A. Slightly to the northwest, slightly.

Q. What is that?

A. Slightly to the north and west.

30 Q. Slightly to the northwest?

A. Principally west.

Q. Now, what direction does the track No. 5 or the side tracks run from the lead?

A. They run west off of the lead.

Q. Run west off of the lead. Now, how many of those side tracks or spurs are there leading off of this lead, about how many?

A. They run as high as 19, and then there is an outside track we call the ice house track, or was at the time that I was working there.

Q. Now, tell the jury whether or not those spurs or side tracks leading off of the lead have any grade?

A. They are supposed to be water grade.

Q. Well, I want to know now not what they are supposed to be, but whether or not there was a grade there.

Mr. White: I object to that for the reason the Supreme Court holds that it is not negligence for the railroad company to have gravity tracks in those yards, if that is the purpose of the question.

Mr. Durham: I am not claiming that as negligence, but just want the surrounding circumstances.

The Court: Objection overruled.

To which action and ruling of the court defendant then and there duly excepted.

(Question read by the reporter.)

A. A slight inclination down hill towards the west.

Q. Towards the west?

A. Yes, sir.

Q. Sufficient, was it, for cars to gravitate, to move over there by gravitation down that way, towards the west?

A. As a general rule.

31 Same objection by defendant to the question.

The court overruled the objection; to which action and ruling of the court defendant then and there duly excepted.

Q. What was the answer?
A. As a general rule it ran in there.
Q. How was this track 5?

Same objection by defendant. The court overruled the objection. To which action and ruling of the court defendant then and there duly excepted.

A. What is that, overruled; the question, Judge, or——
The Court: You go on and answer.
Q. The court overruled his objection. You answer the question.
A. Why, it is down hill a little, yes.
Q. Down hill a little?
A. Towards the west.
Q. Now, you had a train of cars coupled up on track 5, you started awhile ago to tell us what you were going to do or did do with those cars. Just proceed and tell what you did with those cars.
A. Pulled out that string of cars, probably 25 cars, or thereabouts; now, I could not state positively, that is as near an estimate as I could make on it.
Q. Yes.
A. Switched the loads out towards track 9 or 10, down that lead, I was tending 5 track switch.
Q. What were you doing?
A. Tending the switch on 5, leading back into No. 5, or throwing the empties all back into 5.
32 Q. You were taking the loaded cars out of this train of cars and putting them in on another side track and returning the empties back to 5; is that what I understand you to mean?
A. Yes, sir.
Q. You say you were tending switch. Just explain whereabouts the switch to track 5 is with reference to the lead?
A. It is the switch on the lead by which you could control the switch points going towards 5 track and 6 track, either one, 5 and 6 are both on the same track outside of my lead switch that I was working at.
Q. You were there working at the switch that diverted cars off the lead onto track 5, is that right?
A. Track 5 and 6, either way, it would be used; in use setting for track 5.
Q. For track 5 onto the lead?
A. Yes.
Q. You were there operating that switch at that time?
A. Yes, sir.

Defendant's counsel objected as leading.

Q. What were you doing at that time?
A. Tending that switch.
Q. Tell the jury now how many empty cars, if you remember, there were in that train of cars, and what you did with them.

A. If I remember right, there was three went back in there the first time on track 5.

Q. Now, just a little louder, we cannot hear back here; I don't know whether the jury can hear.

A. I think there was three cars in the first cut went back to 5, and another bunch out — the lead, and two cars back to 5, a box car and a coal car, another bunch out to the lead, and
33 then I think there was six cars went back to No. 5.

Q. What was Mr. Small doing there with reference to taking this train of cars over and cutting out the empties or the loaded ones and putting back the empties?

A. He was coupling cars, coupled together down on the track they was going toward.

Q. Was it part of his duties there to couple the cars down from the engine, to keep them coupled?

Mr. White: I object to that because the witness has stated that they were throwing the empties in on track 5, and Mr. Small was struck on that track, and the question of what his duties were would be a conclusion, and not competent.

The court sustained the objection.

Q. What was he doing there, Mr. Kay?

A. What was he doing where he was working, you mean down on the track that the loads was going toward? He was getting them coupled up.

Q. Yes.

A. He was coupling them up.

Q. Coupling up the cars, was he?

A. Yes, sir.

Q. Tell the jury whether or not he coupled up the loaded cars that were taken off track 5?

A. Yes, sir.

Q. He did?

A. As far as I know he did; he was down there working at it, anyway that was all coupled when we got ready to pull them out of there.

Mr. White: I object to that answer as not responsive.

A. They were all together when we pulled the cars out of this track to separate the short loads.

34 Q. Did Mr. Small go with the train, do you know, after it was taken off of track 5 and ran down the lead to some other track, did he go with the train or cross over to the train?

A. You mean did he ride out on that train?

Q. No, I don't mean that. I just want to know if he went over there where you were taking those loaded cars.

A. He went over and lined the switches to put the cars in where the foreman instructed him.

Q. Did you see him over there?

A. Yes, sir.

Q. How far was this from track 5, approximately?

A. He lined up No. 9 switch.

Q. How far, now, is No. 9 switch, about, from No. 5 switch?

A. From where I was working, I judge it is 220 feet.

Q. 220 feet, you think. How far was that No. 9 switch from—on the lead, I will say—I don't know whether you answered with reference to that, but how far down the lead from No. 5 or No. 9, track No. 5 and track No. 9 are switches off of the lead, aren't they?

A. Well, you understand the switch 5 sets up here on the lead, No. 9 switch sets down here probably 220 feet from where I was at, at 5 switch.

Q. Where you were at 5 switch. Well, now, how far from No. 5 switch, do you say, down the lead is No. 9 switch?

A. Probably 220 feet, or thereabouts. I couldn't say positive, I didn't measure it.

Q. Now tell the court whether or not you put on the loaded cars—didn't cut out the loaded cars and took them on down the lead, and whether or not you brought the empty cars back on 5?

35 Defendant's counsel objected to the question as leading and suggestive.

The Court: Yes, it is leading; objection sustained.

Q. Tell what you did there with reference to the empty cars?

A. Threw them back on track No. 5.

Q. Yes. Did you put them all back in one train?

A. All together, you mean?

Q. Yes, sir.

A. No, there was three cuts went back on track 5.

Q. There was what?

A. Three cuts of cars went back.

Q. Three cuts of cars—what do you mean by that, Mr. Kay?

A. I mean that the empties were mixed between the loads and there were three cuts of empties went back in there, probably three cars, I think, in the first cut, I am pretty positive.

Q. How many?

A. The second cut was two cars went back to track 5.

Q. Yes.

A. The last cut was six cars.

Q. Now, tell the court where you were when the six cars went back to track 5.

A. They threw out a bunch of loads down towards the lead, and the cars went over the switch a little.

Q. Went where?

A. The cars they had ahold of with the engine went over by the switch a little, and I was unable to get the switch over.

Q. What switch were you at?

A. 5 switch.

Q. 5 switch?

A. The lead, the main lead switch.

Q. Now the first cut, you testified, I believe, contained three cars and the next cut two cars?

A. Yes, sir.

36 Q. Now, what did the next cut contain?

A. Six cars he had hold with the engine.

Q. Now, were those six cars the ones that hit Mr. Small?

A. They was.

Q. They were. Now, tell the court did you see them strike, Mr. Kay?

A. I seen them strike the other cars; yes, sir, seen the mark on the drawbar where the man threw up when he was hit with them.

Q. After he had been hit?

A. Yes, sir.

Q. But you didn't see the cars just as they struck him; you only saw where he was struck afterwards?

A. You see my attention was to watching the middle drag—two would be cut out probably twenty feet before these cars would hit.

Q. I see, you were up at the point of the switch?

A. I was on the north side at an angle probably—I don't know what that angle would be, but I was standing outside at 5 switch, about 12 or 14 feet from the switch and I could see to within 20 feet of where they hit.

Q. Who first told you that he had been struck after he was struck?

A. I was the first man seen him in the cars.

Mr. White: Defendant moves to strike out the witness's answer to the effect that he saw the six cars that struck him, for the reason that his answer is based on hearsay; he didn't see the six cars strike.

The court overruled the motion to strike out; to which action and ruling of the court defendant then and there duly excepted.

37 Q. Just tell, Mr. Kay, when you first saw Mr. Small just before he was killed.

A. The last time I seen him before he was killed he was trying to get a knuckle open on track No. 5.

Q. A knuckle on what?

A. On a car that he was supposed to couple it to.

Q. Did you notice him before he went over on track 5?

A. Yes, sir, he was standing — No. 9 switch.

Q. Now, where was the foreman, did you see the foreman at that time?

A. The foreman was opposite and maybe about ten feet away on the opposite side.

Q. He was right on the opposite side of track 5 from you?

A. Yes, sir.

Q. How far from you was he?

A. Probably ten feet.

Q. Ten feet. Did you see the foreman give any signal for Mr. Small at that time?

A. The foreman gave Mr. Small a signal that he was going to shove in on track No. 5 and gave him a signal to couple up, that way (indicating).

Q. Where was Mr. Small when he gave that signal?

A. Standing right on No. 9 switch on the switch track.

Q. What did Mr. Small do after that?

A. Walked straight across to No. 5.

Q. Walked straight across to No. 5, and then what did he do, if you know?

A. He would couple, close up, he was trying to open a knuckle there.

Q. Where was the engine when he was trying to open up the knuckle?

A. Shoving in on track 5.

38 Q. Shoving in on track 5?

A. It pulled up these six cars over the switch that I was tending, and Small walked across from 9 switch over on track 5 and was in the act of trying to open a knuckle.

Q. That was when you last saw him?

A. They pulled up these six cars and started to shove them in on track 5.

Q. Well, did they shove them in?

A. They shoved in probably three car lengths or four, and then gave them a kick and cut them off.

Q. Now, what do you mean by that, gave them a kick?

A. I don't know how you class that in court.

Q. Well, what do they do when they give them a kick?

A. Why, they back up more rapid than they would shoving them in.

Q. Do they let go of them?

A. Yes, sir, cut them off.

Q. Cut them off the engine?

A. Yes, sir.

Q. And then what did the cars do?

A. Give them a sufficient kick to go on in the clear.

Q. Give them a sufficient kick to go on of their own accord?

A. Yes, sir.

Q. Now, is that what your engine done to these six cars?

A. That is just what was done.

Q. Yes, what was the signal that Mr. Lonergan gave, now, to Mr. Small as to what he would do with those six cars?

A. He gave a signal that he was going to shove in.

Q. Shove in, explain to the jury what is the difference, if any, between the shove in and the kick?

A. A man is going to shove a string of cars in.

39 Q. Just explain it so the jury can hear you.

A. We shove in and couple them on, after the cars were all together he would then give them a little more steam and kick them down in the clear, or kick them further down.

Q. That would be in coupling, but what is the difference between

a shove in couple and a kick in couple between the signals, if there is any given by the foreman?

A. Well, a shove in——

Q. (Interrupting.) Well, maybe I am not quite clear, Mr. Kay. What is the difference, we will say, between a shove-in and a kick-in, so far as the engine is concerned?

A. Why, the engine would be handled slower.

Q. What is the difference with reference to any control over the cars between a shove-in and a kick-in?

A. All the difference in the world.

Q. Well, what is that?

A. If they was going to kick the cars, they give them a kick, so the engine would stop before he got to 5 switch, give me an opportunity to throw the switch, so the engine would not have to hurry ahead again, and shoving in the probabilities were that the cars would—the engine would shove down and couple the cars all up, then kick them on up in there.

Q. That is what I am getting at. In the case of a shove-in would the cars remain attached to the engine?

A. They would be attached.

Q. Until the coupling?

A. Until the cars were all together.

Q. Now, then, in case of a kick-in what would they do with reference to it?

A. Pay no attention to the cars.

Q. Pay no attention, the engine would be cut loose before the coupling was made?

A. Before they would attach the other cars, yes, sir, or before he would get to my switch.

Mr. White: I don't want to object as leading.

Q. Just tell the jury, now, what was done there—when you saw Mr. Small last just tell the jury whether or not there was any difference between a shove-in signal and a kick-in signal.

A. Sure.

Q. There is a difference, and did you see Mr. Lonergan give any kick-in signal to Mr. Small?

A. Not to Mr. Small, no, sir.

Q. Well, did he give a kick-in signal—a shove-in signal to Mr. Small?

A. Yes, sir.

Q. Now, just show the jury what the difference between those signals is.

A. I ain't got no cars up here.

Q. Well, now, take a shove-in signal.

A. A shove-in sign would be that way (indicating), and a kick-in sign, that way (indicating); he would not transfer that to the man coupling cars, as a general rule, though the man coupling cars would happen to see him give a kick-in signal.

Q. Did you see him, then, give that shove-in that way to Mr. Small when he was going to track No. 9?

A. Not when he was going over, I seen him standing at track No. 9, he gave a sign that he was going to shove in for him, to couple them up.

41 Q. Then Mr. Small went over to track 5?

A. Yes, sir.

Q. Now, what were these cars doing, if anything, were they moving when he was to couple up to, that were down on track 5?

A. What would they be?

Q. Were they moving or were they standing still, I mean the cars it was coupled to?

A. They were moving slowly.

Q. I understand now the engine was bringing in some cars, how many, do you remember?

A. Six cars.

Q. And there were already some cars down on track 5?

A. Five cars and two cuts.

Q. How many cars were there down there, five cars, two cuts, how many cars in the cut that was next to the six?

A. Two cars, a box car and a coal car.

Q. What were those cars doing, were they standing still?

A. They were running, those two cars were running slowly.

Q. Where, on track 5 or 9?

A. On track 5.

Q. Now, then, what did Mr. Small do with reference to those two cars on track 5?

A. He walked over from No. 9 switch and was in the act of trying to open the coupler, get the knuckle open to couple on.

Q. When he was doing that where was the engine and the six cars, what were they doing?

A. The engine and the six cars was coming towards me at that time while he was working there.

Q. I know, but while he was walking over, after he got the signal?

A. They pulled back up over the switch that I was at.

42 Q. My question was after Mr. Small got the signal that they were going to shove in, what did the engine and six cars do, where were they and what did they do?

A. They were down the lead towards No. 9 switch, probably half a car length over the switch that I was tending, and pulled back up over the switch and Charles started and was walking across.

Q. Yes.

A. And they started to shove in there, and Small got over to this coal car and was trying to open this knuckle on that coal car, and they started to shove in, and then gave them a kick, and cut them off.

Q. Now, how far were the cars that were kicked in from Mr. Small, how far were the cars that were kicked in from Mr. Small the last time you saw him when he was there trying to open that knuckle?

A. Well, that would be a hard question to answer.

Q. Your best knowledge.

A. But I would guess probably 20 feet.

Q. How much?

A. Probably 20 feet, when the gap closed up, and Mr. Small was out of sight from me.

Q. Out of your sight?

A. Yes, sir.

Q. What obstructed your view?

A. The six cars going in against him.

Q. The one next to him, one of the six cars next to him?

A. Yes, sir.

Q. Now, tell the court when it was that the cars that were attached to the engine were kicked.

Mr. White: We object to that; the evidence shows that the
43 cars obstructed his view from the other cars. I object to the question as leading and suggestive and assuming that he knows.

The Court: Objection overruled.

To which action and ruling of the court defendant then and there at the time duly excepted.

A. They were kicked before they was connected with the two cars.

Q. That is what I understood you to say.

A. There was a space of about—they started to kick the cars when they was in about five cars by my switch, and when they stopped kicking the cars, the engine was by me probably ten feet.

Q. You mean by that when the engine stopped?

Mr. White: I object to counsel's stating what he means.

Q. What do you mean when they stopped kicking the cars?

A. When the cars were cut off.

Q. Well, now, is there a man riding on the engine under those circumstances, to tend to cutting off the cars?

A. Mr. Pipes got on the engine and cut the cars off.

Q. Mr. Pipes?

A. Yes, sir.

Q. And how far were the cars, the six cars, now, from the other two which Mr. Small was working with, when they were cut off, about how far?

A. I judge about half a car length, maybe, 20 feet.

Q. About 20 feet?

A. About 20 feet.

Q. And when did you next see Mr. Small?

A. The engine came back up over switch No. 5, and I threw the switch and got on the footboard, and Mr. Pipes was already
44 on there, rode down, coupled onto these loads and got about a car length of those loads that were down there, and I looked across and seen Mr. Small laying on his stomach on the north rail, with his hips in the air.

Q. That was on this track 5?

A. Track No. 5.

Q. Switch track, whatever you call it?

A. Track 5, the north rail, and I says to Pipes, "For God's sake look there"——

Defendant's counsel objected to what was said.

Q. Yes, you don't need to tell what was said. What did you do?
A. I ran right over there as quick as I could to see if I could render any assistance.
Q. Well, what condition was he in?
A. Dying.
Q. Did he die there?
A. Yes, sir, in about thirty seconds.
Q. What was done with him—with his body?
A. They got a car out of the train yard shanty——

Mr. White: I object to what was done after the accident, after his death, as immaterial to any issue in this case.
The Court: Yes, it don't make any difference.

Q. Now, Mr. Kay, tell the jury if you know anything about the condition of the coupler on this car that you saw Mr. Kay trying to open the knuckle of—or Mr. Small trying to open the knuckle of?
A. Repeat that question.
Q. I will repeat the question. Do you know anything about the condition of the coupler that you saw Mr. Small working with
45 there as he walked down behind those cars?
A. That is the car that he was working on, the car that went back to 5 that he was trying to get in shape, to couple onto, you mean?
Q. Yes, sir, just before he was hurt?
A. The coupler was not in proper working condition at the time we switched the loads out towards No. 9, the man following the engine was unable to catch the pin with the pin lifter.

Mr. White: We move to strike out the answer as not responsive, and stating a conclusion of the witness.
The Court: It is a conclusion. Objection will be sustained.

At this point court took a recess until 2 o'clock P. M.

Afternoon Session.

W. C. Kay, further testified upon direct examination as follows:

By Mr. Durham:

Q. Mr. Kay, state to the jury—do you know the condition of the drawhead—of the coupling device that was on the east end of that car which you saw Mr. Small handling or fooling with?

Mr. White: I object to that as asking for a conclusion, because the witness has not qualified as an expert machinist.
The Court: Yes, he can state what the condition was, what shape it was in.

(By Mr. Durham:)

Q. I will ask him if he knows what shape it was in. You can answer that yes or no.

46 A. You mean, Judge, do I know whether it was in working condition or not?

The Court: Just describe what was the matter with it, if anything.

A. The car that he was trying to open the knuckle on was a Climax coupler.

(By Mr. Durham:)

Q. A Climax coupler?

A. Yes, sir, coal car with iron bevel blocks on the end of it, the man pulling the pin was unable to cut these two cars off going into track No. 5, and as I was on the opposite side, and on the north side of the string of cars and was tending switch 5, it became my duty, seeing that the man could not cut them off that was pulling the pins, to assist him, I cut the cars off from the north side.

Q. Well, which side did you cut it off from, the one that Mr. Small was fooling with or the one that was attached to it?

A. The one that was attached to it.

Q. Now, this was when you drew them out, wasn't it, or first put them in there, which was it?

A. When we were switching them and kicked these two cars back east, but the man pulling the pin was unable to couple the pin to pull these two cars off going back to track No. 5.

Q. Now, which side of the car was he on?

A. He was on the south side and I was on the north side.

Q. Now, state just when this was with reference to the time the two cars were pulled out or shoved back in on track 5?

A. Well, you understand we were switching the string of cars, throwing the loads out and the empties back towards the——

47 Q. Yes.

A. This was two empty cars going back towards track 5.

Q. You were trying to get those two empty cars uncoupled so as to shove them in on 5?

A. Kick them in on track No. 5.

Defendant's counsel objected as leading and suggestive.

Q. Now, tell the court what, if anything, you noticed with reference to the coupling.

A. After I cut the cars off from my side I looked at this coupler to see what was the matter with it, and the heel—the lock block of this draw bar was out so far that you could not raise it up from the pin puller's side.

Q. Now, describe to the jury what sort of a thing this Climax coupler is, and how it operates, so they may understand what you are talking about.

A. Will that come in on that?

Q. You understand the question.

A. The Climax coupler——

Mr. White: Wait just a minute, Mr. Kay, please. I object to that for the reason that the petition does not specify the particular defect in the coupler, and does not specify any defective coupler of any particular character, and if it did so, it would be an act of common law negligence and in no way connected with the injury and the death of the deceased, and could not have been the proximate cause of the injury or death, and it is incompetent and immaterial.

The Court: I take it, it is offered not for the reason that it caused his death, but showing what he was doing at the time of the
48 occurrence that did cause his death.

Mr. Durham: Yes, to show why he was in there, and our petition states that this identical coupler was out of working order.

The Court: Objection is overruled.

To which action and ruling of the court defendant then and there at the time duly excepted.

(Question read by the reporter.)

A. The Climax coupler, if it is not in perfect working condition, the lock block would kick out too far, thereby it locks the knuckles; that would open wider than it would be in its original form.

Q. Well, I don't——

A. And as this man—wait till I get through; if you want to cut in, go ahead.

Q. Go ahead, finish, go on.

A. And the man pulling pins—Mr. Pipes—missed his coupling—his cut, it was my duty to help him out on it; I was on the opposite side where the pin lifter was for the draw head on the other car; I ran up and cut it myself, and as the car is separated I noticed this lock block was out so far that it was not in its proper shape, so that a man could cut off from the south side of the cars.

Q. How did they cut these cars off?

A. With the pin lifter.

Q. Where is this pin lifter located?

A. On the end of the car, on each end there is a pin lifter on each car.

Q. Is that a sort of a lever rod outside the truck?

A. Yes, sir, it acted so a man don't necessarily have to
49 go between to cut them off, he can run along on the outside and take ahold of that handle and cut them off from there.

Q. If it is in working order you can lift that little crank?

Defendant's counsel objected to the question as leading and suggestive. The court sustained the objection.

Q. Ordinarily, you uncouple a coupler of that kind by lifting the pin by means of a little crank and rod running into the coupler, do you?

Defendant's counsel objected to the question as leading and suggestive. The court sustained the objection.

Q. Where is this crank and rod that is attached to the coupler located?

A. It is called the pin lifter and is attached to the lock block on the coupler.

Q. Now, how do you uncouple that car?

A. Pull it with the pin lifter.

Q. Pull it with the pin lifter?

A. Yes, sir.

Q. Now, you stated, did you, that this pin lifter on the car that was drifting down there, when Mr. Small went in it, the knuckle would not open, did you?

Defendant's counsel objected to the question as leading and suggestive. The court sustained the objection.

Q. Well, Mr. Kay, state that again so that we may have it clear what you said with reference to Mr. Pipes and yourself uncoupling this car.

A. We were switching this string of cars and threw a cut out to the lead, and these two cars going back to 5, and Mr. Pipes
50 failed to make his cut from the south side, and seeing that he failed to make it, and the engine backing up again, I cut it from the north side——

Q. Well, what do you mean, now when you say you cut it?

A. Cut it from the opposite car that it was coupled to.

Q. You coupled from the opposite car, the one that it was coupled onto?

A. Yes, sir.

Q. How did you cut it?

A. Pin lifter.

Q. Pin lifter?

A. The appliance was all right on that car.

Q. What is that?

A. The appliance was all right on the car that I cut it off of.

Q. Yes, and when you cut it loose where did it go?

A. Down track No. 5, two cars.

Q. Down track No. 5. How long is that track No. 5?

A. Oh, probably 47 cars.

Q. How much?

A. Hold probably 47 cars, or thereabouts.

Q. Can you give us an idea of the length of that?

A. 47 car lengths, the ordinary car will run about 36-foot car.

Q. About 36-foot car?

A. Something like 47, now, I never measured the track, I don't know anything about that outside it is a good long track.

Q. State whether or not there was any custom, Mr. Kay, in the yards there at that time as to the manner of making a coupling to cars that were being shoved in by the engine, especially with reference to the conduct of the switchman actually making the coupling.

51 Mr. White: Defendant objects to the witness's statement about any custom, for the reason that there is no general

uniform custom alleged in the petition, and if custom were properly pleaded in the petition, it would not bind the defendant because the law is that there is no necessity of giving employes in railroad yards notice of the movement of the cars; the custom would be an illegal custom, and the question is incompetent.

The Court: I don't know whether the custom relates to notice or not.

Mr. Durham. The custom pleaded there is all right.

The Court: The way of handling cars was it?

Mr. Durham: It has been practically covered by the witness already in his testimony, but not in that form.

The Court: Objection overruled.

To which action and ruling of the court defendant then and there at the time duly excepted.

Mr. White: I make the additional objection that the custom would be irrelevant under the testimony of the plaintiff because, if these cars were not shunted in but were kicked in there, a custom to keep the engine attached to cars that were shunted in would not apply to cars that were kicked in. That is the way it is pleaded by the plaintiff in the petition.

The Court: Objection overruled.

To which action and ruling of the court defendant then and there at the time duly excepted.

Q. Go on, answer the question.

52 A. What was the question? Repeat it, please.

(Question read by the reporter.)

Mr. White: I object to that because it is not the custom pleaded in the petition, the custom pleaded in the petition being that it was the custom in coupling cars that were shoved in to have them attached to and under the control of the switch engine and not to make a coupling until signalled by the switchman actually making the coupling.

The court overruled the objection; to which ruling of the court defendant then and there at the time duly excepted.

(Question read by the reporter.)

A. You mean by that question, then, that the man got a signal that you was going to shove in for him to couple them up, do you mean that he would be figuring on them being shoved in, or——

Q. No, listen now, was there any custom as to what he would do just before he made the coupling?

Mr. White: I object to that for the reason that that is not the custom pleaded; it is incompetent, immaterial and prejudicial to the defendant.

The Court: Objection sustained to that question. Just let him state what the custom and manner of making those couplings was.

A. I do not quite understand what you are trying to get at, whether if the man would give him a sign now that he was going to shove in, for him to couple up, this track 5 up, figuring on him shov-

ing or cutting them off. Is that what you are trying to get at?

53 Q. Well, you put a question along that line; that is not exactly what I asked you.

A. That is what I am trying to get.

Q. No, you are intending to base the question on the fact that the cars were to be shoved in, that is the idea.

The Court: There you are basing it on whether the cars are to be shoved in, and not kicked in.

A. A man gives me a signal for me to couple up the cars he was going to shove, I could go in there and adjust the coupler and open the knuckle so they could be coupled up and figure on him stopping till I got out of there, and gave him a sign that I was ready for him to back against those cars.

Mr. White: I move to strike out that answer of the witness as not responsive.

The Court: Yes; motion will be sustained.

Q. I will ask you the question, it probably can be answered by yes or no, whether — was a certain custom; then I will ask you what it was. Now, was there any custom, was there or was there not any custom when cars were being shoved in for the purpose of being coupled up, for them not to make the actual coupling until the switchman who was to make the same, should signify that he was ready to come out and was in the clear?

A. There was.

Mr. White: Wait a minute. Defendant objects to that for the reason that it is incompetent because no custom pleaded; if there was such a custom it would be an illegal custom, the law being

54 that there is no obligation to give notice of the movement of cars in a freight yard, and it is leading and suggestive.

The Court: It is subject to that last objection.

Mr. Durham: I asked him whether there was or was not such a custom.

The Court: You defined what the custom was. What you want to develop is whether there was a custom in regard to coupling cars, but you go ahead and define it in your question.

Mr. Durham: My first question asked was intended to obviate that objection.

Q. Now, Mr. Kay, was there or was there not a custom with reference to the coupling of cars as to what the switchman would do with reference to the coupling of cars that were shoved in? Answer that yes or no.

Defendant's counsel objected for the reason that the allegation of custom pleaded in the petition is not a general uniform custom or one that the defendant could be charged with knowledge of under the law, and for all the reasons mentioned in the preceding objection. The court overruled the objection; to which action and ruling of the court defendant then and there at the time duly excepted.

Q. Now, you can answer.

A. The foreman of the engine——

The Court: Just as to whether there was a custom or not.

A. There is.

(By Mr. Durham:)

Q. Just state what that custom is or was.

A. The foreman of the engine is the superior officer of the
55 engine; the helper is working under his instructions all along and at all times, he gives his helpers a sign what he wants them to do; if the man goes in there and has trouble with the coupler, it is up to the foreman to wait till he gets a sign from the man that is doing the coupling; if he knows it is all clear, he has got a right then to do as he pleases, the foreman.

Mr. White: I object to that and ask that the answer be stricken out as the witness's individual opinion, and not responsive to the question, and being upon an immaterial matter and usurping the province of the jury, and reciting the issues involved in the case, and being a matter about which the jury is as competent to judge as the witness, reciting ultimate questions of negligence in the case.

The court overruled the objection and motion to strike out; to which action and ruling of the court defendant then and there at the time duly excepted.

Q. Did you examine this car that you saw Mr. Small handling, this end of the car that you saw Mr. Small handling there, after he was killed?

A. I did.

Q. What did you find there on the draw head and around?

A. The lock block was shoved out so far it would not permit the pin lifter to raise it to open the coupling.

Q. Did you find anything on the draw head that would indicate that Mr. Small had been hurt there?

A. Yes, sir.

Q. State what you found?

A. He had thrown up on the draw bar.

56 Q. What is that?

A. He had thrown up on the draw bar and on the end of the car, on the man killer and the buffer blocks.

Q. What is that?

A. He had thrown up on the draw bar and that block, and the buffer blocks.

Q. You mean he vomited on there?

A. Yes, sir.

Q. What is the buffer block, the man killer, you call it?

A. It is the block to keep the pressure off the draw bar.

Q. Where is it with reference to the draw bar, describe it.

A. On each side of the draw bar there is one on each side, a casting, probably 6 inches wide by 8 or 10 inches.

Q. Now, where was this vomit with reference to the draw bar?

A. It was all over that end of the car, the buffer blocks and draw bar too, and on the hose, air hose.

Q. State to the jury whether or not this car, when you examined it, was coupled up to the six cars that were shoved in there.

A. It was not, both knuckles were closed, that is after the accident.

Q. Yes. After the accident when you examined it how far, now, after these cars were kicked in there and ran in against this car where Mr. Small was killed, did they run down the track No. 5?

A. From where the first vomit was shown to where he was on the track was probably two car lengths, and from where he was run over the cars ran about—there were six cars in the cut, and they went by him probably five car lengths.

57 Q. They passed on down about five car lengths?

A. About five car lengths and stood separated about a car or a car and a half, about 40 or 50 feet.

Q. Then how many cars had passed along over Mr. Small, if you know?

A. There was the best way we could figure, the first car when the slack ran out, he dropped down in the middle of the track, and the first car that passed over him he was in the middle of the track because his overalls and part of his work clothing were attached to the bottom rod and brake lever, this first car that passed over him in the middle of the track, and the way everybody thought——

Mr. White: You need not state that.

Q. Yes. Don't state what everybody thought. Just state what you saw there.

A. The last marks—the last marks in the middle of the track that anyone had to go by was his overalls on the first car that had passed over him, and then he would have had to have been in the middle of the track to have caught his clothing on the bottom rigging of this car, the brake rigging.

Q. Was he maimed in any way by the wheels, could you say?

A. Ran over above his hips.

Mr. White: I object to that as immaterial as to how he was killed.

Mr. Durham: Well, is it admitted that he was killed by these two cars coming together?

Mr. White: It is admitted he was killed there.

The Court: Objection overruled.

To which action and ruling of the court defendant then and there at the time duly excepted.

58 Q. Answer the question.

A. The first cars had marks that he had been caught by that car in the middle of the track.

Q. Yes, sir; but I am asking you whether or not his body showed that he had been struck in any way by the wheels.

Defendant's counsel objected.

A. It was lying across——

Mr. Lyons: We object to that as calling for the opinion and conclusion of the witness.

The Court: He can state the fact where the wheels did run.

To which ruling of the court defendant then and there duly excepted.

Q. Just describe his body as to injury.

A. He lay across the north rail of track No 5.

Q. What is that?

A. He laid across the track on his stomach, track No. 5, the north rail.

Q. Do I understand you to say that his body was laying across the north rail?

A. Was laying across the north track, north rail of track No. 5, on his stomach, with his hips to the north, and his head and trunk in the middle of the track; his face was facing the east.

Q. Now, tell the jury whether or not the car had apparently run across his body on the rail?

Defendant's counsel objected to the question as asking for the opinion of the witness.

The Court: Just describe the condition; objection sustained.

Q. Tell the part of his body, then, as to its injury, if any.

59 Mr. White: I object to his repeating that: he has just told that the car ran over his body, three times. I object to that, he has told three times that he was laying with his face down and the cars ran over his body, and it is useless repetition, for the purpose of prejudicing the jury, and incompetent.

The Court: I don't understand whether the car had run over him or not.

Mr. Durham: That is what I want to find out; he's objecting to my question.

The Court: I don't understand whether the wheels had run over him or not.

(By Mr. Durham:)

Q. Just describe the condition of his clothing and his body.

A. His clothing was—his outside clothing were mostly torn off, his overalls in particular.

Q. Was there any blood?

A. Yes, sir; blood right across that way (indicating) and his face and his hands was bleeding; his body laid right across the rail like that (indicating), with his hips and legs on the north rail, on the north side of the track.

Q. Now, were there any marks showing that anything had run on him, run over him?

Defendant's counsel objected to the question as leading and suggestive.

A. I answered that once, didn't I?

The Court: Yes, it is a leading question.

Witness: Is that clear, Judge?

The Court: How is that:

Witness: That is clear, I answered where it ran over him, the marks were.

60 (By Mr. Durham:)

Q. Well, do you know whether the car ran over this man?

The Court: You mean the wheels, you don't mean the car.

Q. The wheels, yes, the wheels of the car.

A. Had the marks on his clothing that it ran over him.

Q. Who was Mr. Pipes, was he one of your helpers there?

A. He was helping on the same engine that I was; he was pulling pins, yes, sir.

Q. Pulling pins?

A. Following the engine, we call it.

Q. Following the engine?

A. Following the engine, the man cuts off all the cars.

Q. You have one man who cuts off the cars, that is, pulls the pins, another man who couples up?

A. Yes, sir.

Q. And another man who throws the switch?

A. Yes, sir.

Defendant's counsel objected as leading.

The Court: Objection sustained.

Q. Mr. Kay, can you state to the jury whether or not there were any other cars on this switch track No. 5 besides the two cars which Mr. Small was following, and were drifting down, and the six cars attached to the engine?

A. There were three cars standing still about six—about eight car lengths in on that track, the first cut were kicked back in there, was standing there, *there* cars.

Q. I asked you to describe the signals of shove in and kick in, but I don't think I asked you to give both of those signals to the

61 jury so they can see. Now, just tell in your own way, what we have been trying to get at here, more particularly, in your own way what you saw there as to the signals and as to the manner in which Mr. Small was killed, in a connected way; we have had it piece meal.

Mr. White: I object to the repetition.

The Court: I don't see any occasion to go over it again.

Mr. Durham: Your Honor, the interruption of the noon hour—and I wanted the witness to—he testified in a general way—to testify in a more connected way then when I put the questions to him.

The Court: I know, but we cannot go back over what he testified to before noon.

Mr. Durham: Oh, no; not that; I just want him to testify in a connected way and in his own way, what he saw there, very briefly.

The Court: Well, he has described it very minutely.

(By Mr. Durham:)

Q. From the time now, Mr. Kay, after the signal given that you testified about by the foreman to Mr. Small that he was going to shove in, what did the engineer do with the six cars?

A. He started shoving in on track No. 5.

The Court: He testified about that before dinner; he said he brought those cars down and put them in on 5.

Mr. White: Yes, I object to it as useless repetition.

Q. Did you see the foreman give any other signal there to the engineer?

A. After the engine passed by me I seen Mr. Lonergan
62 give him a signal to cut them off and a signal to kick them.

Q. A signal to cut them off and a signal to kick them?

A. Mr. Pipes got on the footboard and cut them off.

Q. Mr. Pipes cut them off?

A. Yes, sir.

Cross-examination by Mr. White:

Q. Mr. Kay, as I understand you, the deceased was between the first of these two cars and the sixth car. Now, which way were those cars being shoved in on the track?

A. The first two or the six?

Q. The six?

A. Being shoved west.

Q. Being shoved west?

A. In on track 5.

Q. And then Mr. Small, when you saw him last, was at the east end of these two cars?

A. Following them up, walking along.

Q. Following them up, he was not in between the two cars, but was at the east end of the second car?

A. He was on the east end of the east car going into the track.

Q. That is it, he was at the east end of the east car?

A. Of the two cars, yes, sir.

Q. Of the two cars. Then when these six cars following from the east, being shoved in west, came toward him, there were no obstructions there between Mr. Small and those—and the sixth car from the engine, was there?

A. No, there was no cars between him and the cars.

Q. Now, as I understood you, after Mr. Lonergan—he was the switch foreman?

A. Yes, sir.

63 Q. After he gave him—he first gave him the signal for coupling up cars over on track 7?

A. Yes, sir.

Q. That was the track they were making the train up?

A. That is where we were throwing loads out and preparatory to switching and throwing the loads afterward.

Q. You were throwing the loaded cars in on track 9?

A. Yes, sir.

Q. As that was to be the train when it was completed, when it was made up?

A. Yes, sir.

Q. These were empty cars that you were throwing in on track 5?

A. Yes, sir.

Q. And Mr. Small was given the signal that indicated that these cars were going to be shoved in on that track?

A. Yes, sir.

Q. Now, it was just the same, so far as striking the car was concerned, whether the engine was still attached to the cars, or whether it was cut loose, the cars would come back against those cars, would they not, against the two cars?

A. The cars would have come back there, but the man goes in there to open the coupler—I have handled engines all over the country, and if I would give a man a sign to couple up the cars, it would be up to me to know where he was at, until he came out on my side of the cars, to know whether he was in the clear or not. You see in this particular case the three cars that went in there first had stopped, and the two cars that he was following up, trying to get the coupler open on, were still running slow; he had a sign that he was going to shove in, for him to couple up, and
64 he was trying to open this coupler and paying—I don't suppose—any attention, figuring on them stopping for him to couple the cars, or to give me a signal when he was in the clear.

Q. I see.

A. Well, in place of giving the signal and coming out to give the signal, the cars were kicked in there, and there was a gap of about 20 feet at each end; there was three cars standing still down there, and these two that he was following, trying to get the coupler open on, were running slow, probably four or five miles an hour, maybe a little bit faster than that, and these cars were cut off while he was trying to open this coupler—adjust this lock block and this coupler, and they struck the three cars behind and the reaction closed the gap up, and he was in there.

Q. Well, he was between the sixth car from the engine and was walking along following these two cars that were loose?

A. Yes, sir; with his back towards the sixth.

Q. With his back towards the sixth, and before he went in between the sixth car and the east one of the two cars, he had seen Mr. Lonergan give the signal that these cars were going to be pushed in, had he?

A. He gave him a signal that he was going to shove in, to couple the cars up.

Q. Were you looking at him; did he see Mr. Lonergan signal?

A. He answered the signal and walked across.

Q. He answered the signal?

A. Yes.

Q. Then when he went in and started to follow this east
65 car of the two cars you are satisfied that he knew that the six cars were coming behind him?

A. They was to shove in.

Q. Knew that they would be shoved in?

A. According to the signal there.

Q. Now, do you say, Mr. Kay, that it is the duty of the foreman—switch foreman, when a man is not located in between cars but is walking along following a car, and the other cars are following him, that he owes that man any greater duty to look out for his safety than the man owes himself to look out for his own safety?

A. If I would give a man a signal to couple up a track that was going to shove it, it would be my duty as foreman to know that this man was on one side of the track or the other, in the clear, before I would give a signal to cut off the cars or kick them in there.

Q. Well, now, I am not asking for your opinion each time, but just for the facts, now.

A. That is a fact.

Q. Now, in the instance when these cars were being moved, there was six cars coming and he saw the cars coming, and he had had notice that they were coming?

A. He had notice that he was going to shove in, for him to couple onto the other cars.

Q. You say if the man got the cars open then they should have waited for him to give a signal, after the man got the knuckles open?

A. They should have waited for him to open the knuckle on the coming car.

Q. Then when he discovered that he could not open the knuckle, under this rule that you state, wasn't it his duty to stop it
66 and give them a signal that he could not get it coupled, to stop the car?

A. Give a stop sign, yes, sir; if it was so—that way.

Q. That is what he should have done?

A. It was so close that he had no chance, that is the way I would see it.

Q. Ordinarily that would have been his duty if he could not get it—when the cars were approaching him, he was not in between the two cars, but he was at the end of this second car, ordinarily, I understand you, it would have been his duty to step out and give the signal he could not get them open or was having trouble—the stop signal, wouldn't it?

A. If he had the time.

Q. If he had the time, and how long would it take him to step—do you know the distance from the center of the track to the outside of the rail—he could do that in a couple of seconds, couldn't he?

A. But I suppose he was figuring on them stopping till they got a sign from him; that is the way I would account for it.

Q. Not what you suppose, but as it is, ordinarily how long would it take a man to step from the center of the track outside of the outside rail—about a second or two, wouldn't it?

A. Yes, probably.

Q. Now, how fast were these cars being shoved in when they passed you?

A. Passed me, going probably twelve miles an hour.

Q. 12 miles an hour, and do you know how far that would be a second?

A. Never figured it up.

Q. That would be how many feet a second?

A. Never figured it up.

67 Q. Well, they would move about 12 or 15 feet a second, and how far were the two cars in between the sixth car at the time when he started to step in?

A. The sixth car?

Q. How far away was the sixth car when he stepped in there, when you saw him step in there?

A. Let's see—I would guess at about 50 or 75 feet from 9 switch over to where he went to.

Q. Oh, he went over there when the cars were still on No. 9 switch?

A. He was at No. 9, made a couple on No. 9 track, Lonergan gave him a signal he was going to shove in on 5, for him to couple up; he walked across from 9 to 5.

Q. When he walked in there did he look in the direction the cars were coming from before he started to open the knuckle; he could not have or he would not have the signal, would he, because Lonergan was in the——

A. Lonergan gave him a sign before he started, and he walked right straight across—well, I couldn't say now, I would not answer that either.

Q. Did you see him look at Lonergan when he gave him the signal?

A. Yes, and he answered the signal.

Q. What did Lonergan say in that sign, was he going to shove in?

A. He gave him a signal to shove in and couple up on 5.

Q. Then did you see him at any time after that look in the direction that Lonergan had told him the cars were coming in on the track there?

A. I don't think he looked.

Q. Did you see him look?

A. I did not.

68 Q. Didn't see him look. Then when you saw him he had his back to the direction the cars were coming?

A. Yes, sir; tried to open the knuckle.

Q. And was in the act of opening this knuckle?

A. One knuckle.

Q. Now, when you saw him there in the act of opening that knuckle how far away was the sixth car from him that was coming in on track 5, about how many feet?

A. When he got close up, so that I couldn't see him, it was 20 feet.

Q. No, I mean when you first saw him, when he first stepped over there in the knuckle of this east car—east end of the east car, how far away was—not when you last saw him, when you first saw him, how far away was that first car from him?

A. The first car coming towards him, you mean?
Q. Yes.
A. About three car lengths, I judge.
Q. That would be about——
A. 70 feet.
Q. 100 feet?
A. 70 feet, something like that, 80 feet, something like that.
Q. Well, if the cars are 36 feet long.
A. Yes, two cars and a half.
Q. It would be about 100 feet away?
A. 75 to 100 feet.
Q. 75 to 100 feet away?
A. I never measured it.
Q. And the cars were moving about 12 miles an hour in the direction that he was walking in?
A. Yes, sir.

Q. And how fast were these two cars moving that he was
69 following in the middle of the track?

A. I guess about four miles an hour, something like that, he was walking along.
Q. And you didn't see him when he was struck?
A. That is as far as I seen them close the gap up, and it was 20 feet away when he got out of my sight.
Q. You didn't know he was struck until you were going down on the other lead there?
A. Until I seen his body laying on the track.
Q. Until you saw his body laying there, and the engine had pulled these cars out, or the engine had pulled out rather, from the six cars and then it all drifted down the track?
A. The six cars that went down hit the other two and was running on down.
Q. Now, what was the first car that you found signs on to show that the car had run over him; was it that sixth car?
A. The sixth car had his overalls on the bottom rod and brake lever.
Q. In other words, that was the west trucks of the sixth car from the engine that was being pushed in?
A. Both trucks had marks on them.
Q. But you discovered it first on the west truck of the sixth car showing that he had been struck by the sixth car from the engine when it was pushed in there?
A. When it was kicked in there, you mean?
Q. When it was kicked in there. How long had you known Mr. Small?
A. Why, I had known of him I guess about six months, something like that, he had been around there quite a while; I was not personally acquainted with him till he got on the job.

Q. He was an old railroad man, wasn't he?
70 A. I understand he was.

Q. Did you have a speaking acquaintance with him or ever talk with him?

A. Only just in working.

(By Mr. Durham:)

Q. What is that?

A. Only just while working. I was not acquainted with any of the family.

(By Mr. White:)

Q. Mr. Kay, you made out a 335 report after [illegible] occurred and sent it in to your superintendent, didn't you; is that your signature to the report that you sent in, witnessed by Mr. Goddard and Mr. Day. Read it over and see if that is your writing. Did you fill out the body of that; is that your own writing (handing paper to witness, marked by the reporter Exhibit 1)?

Mr. Durham: Give him time to read it over.

A. Yes, that is all right. At the time that statement was made I hadn't had no chance to examine the couplers. I went right over and made that statement out. I said there I had not made any examination of it; afterwards I made an examination of it for my own benefit.

Said report of Warren C. Kay, just identified by the witness, was marked by the reporter Exhibit 1.

Q. Now, I will ask you to look at this map, Mr. Kay, please, and see if that in a general way represents the—now, for instance, here is the St. Louis & San Francisco cut-off, and Chicago, Milwaukee down here, and here is the yards. Now, that place there would represent, say, that cross, the track at the point we have been talking about now, where would be the 5 track. I will ask you first if this
71 map in a general way represents the yard there properly, they are numbered along there, that would be the fifth—now, let's follow in here, that's right.

Mr. Durham: What is the question now?

Q. Whether the map represents in a general way the conditions as they were down there in the yards?

A. Yes, in a general way that represents it.

The map referred to and identified by the witness was marked by the reporter Exhibit 2.

Q. You don't know Mr. Small's signature, do you, Mr. Kay? Did you ever see him write his name?

A. I have seen it, but I could not identify it.

Q. Well, that is all, then.

A. These measurements on that statement there were taken by Milo Goddard; he told me that he had taken the measurements there; I made my statement out on the ground that he knew what he was talking about.

Redirect examination by Mr. Durham:

Q. Who is Milo Goddard?

A. He was at that time the general yardmaster's chief clerk at Hickory Street.

Q. It is mentioned here where you say the car ran 260 feet after the injured person was caught, that is what you mean by the figures being given to you by Mr. Goddard?

A. Yes, sir.

Q. He gave you those figures, 360 feet?

A. He said that was correct, and I made the statement out on his say so as to the distance, because I did not examine it, had nothing to measure it with.

72 Q. Was it customary, Mr. Kay, when cars were being coupled and were being shoved *in*, for the foreman to wait for the switchman's signal?

A. It was.

Q. To make the coupling before they were brought in contact?

A. Yes, sir.

Mr. White: Same objection to that question that I made to the others, Your Honor.

The Court: He has already answered it.

Mr. White: I move to strike out the answer for the reasons given in the other question.

The Court: I don't know what question you refer to, or what objection.

Mr. White: I will make it specific. Defendant moves to strike out the answer for the reason that the answer was given before I had time to make the objection, and for the reason that the custom is not properly pleaded, and the custom asked about is not a legal custom, and if such custom did exist it would be in violation of the law, and the witness's answer was a mere expression of opinion, usurps the province of the jury and decides the issues which the triers of fact are called upon to decide; not a matter of expert opinion, and prejudicial for any purpose.

The court overruled the motion to strike out; to which action and ruling of the court defendant then and there at the time duly excepted.

Mr. Durham: We offer in evidence the letters of guardianship, or curatorship to the plaintiff, Margaret L. Tabor, of the children of Charles H. Small, Harry Hamilton Small, Grace Lucille Small and Margaret Gordyne Small.

73 Mr. White: Defendant objects to the certified copy offered in evidence for the reason that it purports to be a certified copy of the order appointing the grandmother curator of the estate, and not guardian; the petition alleges that suit is brought as guardian, not as curator; and for the reason that the legal essentials of the appointment have not been shown, and the proper representative capacity of the plaintiff to prosecute the action under the statute; and I make the additional objection that the action can only be prosecuted in the manner pointed out by the representatives provided for by the code of civil procedure of the state.

Mr. White: I offer as part of the examination of the witness Kay, the statement of the witness of the accident.

The Court: Any objection to it?

Mr. Durham: I think not.

Defendant's counsel then read in evidence the statement of the witness, Warren C. Kay, heretofore marked by the reporter Exhibit 1, which is in words and figures as follows, to-wit:

EXHIBIT 1.

Form 335—Fourth Rev. 10-1906. 30 M. D. D.

The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Railway Co. and Leased, Operated and Independent Lines.

Report of Personal Injuries to Employes, Passengers or Other Persons.

74 Instructions.—One of these Reports must be made and sent to the Superintendent immediately after the infliction of an injury to any person whatsoever. In case the accident is caused by a train the names of the trainmen and number of train and engine must be given. A separate blank must be filled out for each person injured whether the injury is severe or slight. Every question must be answered fully. If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto. If the injured person is an employe he should also make a statement of facts in relation to the accident on this form.

1. Name, Age, Residence, Street and Number, and Occupation of injured person, and state whether married or single. White or Negro.

Chas. H. Small; address unknown; 42 years old; employed as switchman; married and white.

2. If passenger, where from and destination? ——.

3. Ticket or pass. ——.

4. If an employe, how long engaged in the capacity in which he was acting when injured? How long engaged in same capacity on other roads? Was employed as a switchman; employed as switchman about 6 months.

5. Date and hour of accident? 8:35 A. M.

6. Was it foggy, clear or stormy, daylight, dark or moonlight. Clear daylight.

7. Place of accident. Was it in a freight or round house? On train track or in a yard? If away from station, distance and direction.

75 Mo. P. train yard, East Bottoms, track No. 5.

8. Curve or straight line? Up or down grade? Straight track; water grade.

9. Was it on a highway crossing? If so, give name of same. No.

10. Were gates down? ——.

11. Name of gate-tender or flagman. ——.

12. Number of train or engine, and direction it was moving, and number and initials of cars, and was it a through or local, passenger, mixed or freight train that caused the accident? How many cars in train?

Engine 9442, moving west, freight containing 10 cars.

13. Names of Trainmen or Switchmen and Enginemen. J. M. Flagg, Yardmaster; John H. Lonegan, Conductor; I. H. Pipes, Switchman; Warren C. Kay, Brakeman; Al Mills, Engineer; W. H. Pierce, Fireman.

14. State fully how the accident occurred, and what the injured person was doing when it happened. Where were you at time of accident, and what were you doing? Explain everything in detail. While shoving 5 em-ty box and one em-ty stock car on track No. 5 Chas. Small was killed by being caught between the sixth and seventh cars according to marks on draw bars. I was at No. 5 switch when accident occurred tending the switch. Car numbers were O. C. Ry. 2504, D. R. G. 62963, D. R. G. 37119 X stock XXX St. L. R. M. em-ty Box, D. R. G. 13194, C. S. Ry. 24981, C. S. 13058.

15. Who was keeping lookout? How far was injured party
76 from train when first seen? What alarms were given? By whom, and how far from injured person? What efforts were made to stop train? If dark, was the headlight lighted? Was it oil or electric? John H. Lonegan was giving signal; accident was unobserved until finding of body. Cars had evidently passed over the body at the waist; it was daylight and eng. had no headlight burning.

16. Speed of engine or cars at time of accident? 4 to 6 miles per Hr.

17. If train was late, how much? If backing up, who was on rear end? ——.

18. If person was injured while coupling or uncoupling, who examined coupling apparatus? Was it in good order? Was killed while in act of coupling car supposedly.

19. If in bad order, were they so marked? ——.

20. What kind of draw-bars were cars equipped with? Whose make, and were they of equal height? Were there grab irons on end of cars?

2504 O. C. Ry. Climax coupler, 62963 D. R. G. Sharon.

21. Was this accident in any way the result of tools or machinery being in bad order? If so, what was the style of defective apparatus? Or if by carelessness of any employee, how and of whom, and how long had employe at fault been employed in that capacity, and how long on duty?

Having made no examination could not say.

22. Who was running engine, and was it properly handled? Al Mills.

77 23. Description of injuries. Leg or legs broken and body ran over at waist just above hips, right hand and fingers broken or twisted out of place.

24. Name and address of surgeon called. No doctor called.

25. What was done with and for injured person? Injured person's body was placed on stretcher and remains turned over to coroner.

26. What distance did engine or car run after accident? Cars ran 360 ft. after injured person was caught.

27. What does injured person say was cause of accident, and who, if anyone, does he blame for it? In your opinion who is to blame? Injured person was unable to give account of accident as he was taking his last breath when we arrived at his side.

28. Name, Occupation and address of every person who witnessed accident or can give any information regarding it. Name, ——. Occupation, ——. Residence (Give street and number), ——.

29. Give name, occupation and address of the persons who first got to the injured person after accident.

Name.	Occupation.	Residence (give street and number.)
John H. Lonegan	Switchman	Unknown.
I. H. Pipes	Switchman	Unknown.
Warren C. Kay	Switchman.	1208 West Elm, Independence, Mo.

78 30. State fully any further information you have in the matter ——.

(Sign here.) WARREN C. KAY.

(Occupation.) *Switchman.*

(Address) Independence, Mo. 1208 West Elm.

Witness:

M. J. GODDARD.

R. D. DAY.

Place. Month. Day.

Dated at K. C. April 9, 1910.

The Missouri Pacific Railway Co., St. Louis, Iron Mountain & Southern Railway Co. and Leased, Operated and Independent lines.

Report of Personal Injury.

Name, ——. Place, ——. Date, ——. Residence, ——.

Persons will be injured under such circumstances that this blank will not fully cover. When such is the case, fill up as much of the blank as can be used and attach hereto a letter with a full statement of the facts as to the cause of the accident, together with the names of every person who witnessed the same. As far as possible, each employe will fill out this report in his own handwriting and in his own language. It is not probable that all employes are in a position to see an accident in precisely the same light, therefore the copying of one another's report is not permissible.

The Head of Departments will see that the above instructions are carried out in the rendering of this report. Where people cannot write, their names to this report should be signed by mark in the presence of two witnesses, who will sign as such on this report.

79 Mrs. Margaret L. Taber, recalled as a witness on the part of plaintiff, further testified as follows:

Direct examination by Mr. Durham:

Q. Mrs. Taber, are you the only grand-parent of these children?
A. Yes, sir.
Q. Are the other grand-parents all dead?
A. Yes, sir.
Q. Have they any uncles or aunts?
A. They have one aunt in West Virginia.
Q. West Virginia?
A. Yes, sir.
Q. You are the nearest and closest relative they have living here in this state?
A. Yes, sir.

Defendant's counsel objected as incompetent and immaterial.

The court overruled the objection; to which ruling of the court defendant then and there at the time duly excepted.

Q. Do they live with you and have they lived with you?
A. Yes, sir.
Q. How long?
A. Since their father's death.

Defendant's counsel objected for the same reasons.

The Court: Yes, I don't know that it makes any difference where they have lived. Objection sustained.

Mr. Durham: She is the natural guardian.

The Court: But where they have lived since his death don't make any difference.

Mr. White: I object to the statement of counsel that the plaintiff is the natural guardian, for the reason that it is outside of the
80 record and it would not give the plaintiff any right to sue unless she has been appointed as required by the code.

The Court: The objection to the statement of the counsel will be sustained; he is not testifying.

Mr. Durham: I did not mean to make that statement before the jury.

Q. That is all.

Mr. Durham: We ask the stenographer to mark this paper called "Letters of Guardianship or Curatorship."

(The paper referred to being letters of guardianship or curatorship, was marked by the reporter Exhibit 3.)

Mr. Durham: We offer in evidence Exhibit 3 as just marked by the stenographer.

Mr. White: I renew my objection to Exhibit 3 just offered; make the same objection I did this morning.

The Court: Objection is overruled.

To which action and ruling of the court defendant then and there at the time duly excepted and still excepts.

Said letters of guardianship or curatorship, offered in evidence by plaintiff and heretofore marked by the reporter Exhibit 3, are in words and figures as follows, to-wit:

EXHIBIT 3.

Letters of Guardianship or Curatorship.

STATE OF MISSOURI,
County of Jackson, ss:

In the Probate Court at Kansas City.

The State of Missouri to all Persons to whom these Presents shall come, Greeting:

81 Know Ye, That Whereas Harry Hamilton Small, Grace Lucille Small and Margaret Gordyne Small, minors of Jackson County, Missouri, children of Charles H. Small and Lucy H. Small (both deceased) and heirs of Charles H. Small, late of Jackson County, State of Missouri, are possessed of an estate, and have no legally appointed custodian therefor.

To the end, therefore, that the estate of said minors may be collected and preserved for their use and benefit, we do hereby appoint Margart L. Taber as Curator of the Estates of said Harry Hamilton Small, Grace Lucille Small and Margaret Gordyne Small, with full power and authority to collect and secure or take charge of any and all property, of every kind and character, belonging to said minors, and to manage and dispose of said property according to law.

In Witness Whereof, I, F. W. Klaber, Jr., Clerk of the Probate Court, within and for the County aforesaid, have hereunto set my hand and affixed the seal of said Probate Court at office in Kansas City, Mo., this 15" day of April, 1910.

[SEAL.] F. W. KLABER, JR., *Clerk.*

Clerk's Certificate.

STATE OF MISSOURI,
County of Jackson, ss:

I, F. W. Klaber, Jr., Clerk of the Probate Court within and for the County and State aforesaid, hereby certify that the above and foregoing is a full, true and complete transcript of the Letters of Curatorship issued to Margaret L. Taber on estate of Harry Hamil-
82 ton Small, Grace Lucille Small and Margaret Gordyne Small, minors, as the same remains of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of said court at office in Kansas City, Mo., this 18th day of March, *U. D.* 1912.

[SEAL.] F. W. KLABER, JR., *Clerk.*

Judge's Certificate.

STATE OF MISSOURI,
County of Jackson, ss:

I, J. E. Guinotte, sole Judge of the Probate Court of Jackson County, State of Missouri, do hereby certify that the above named F. W. Klaber, Jr., by whom the foregoing attestation was made, was at the time of so making the same, and is now, the Clerk of said Court, to all whose acts as such, full faith and credit should be given as well in courts of this jurisdiction as elsewhere; that the seal thereto annexed is the seal of said Probate Court, which said attestation so made by him is in due form of law, and that he was entitled so to do.

Witness my hand this 18th day of March, A. D. 1912.

J. E. GUINOTTE, *Judge.*

Endorsed upon the back: No. 10372. Authenticated Copy of Small heirs from Probate Court of Jackson County, Missouri, at Kansas City.

Mr. Durham: I desire to amend the petition by prefixing to line 3 from the top of page 1 of plaintiff's petition the words "curator of the."

83 Mr. White: Now the defendant objects to the amendment by interlineation at the close of the plaintiff's case by adding to the petition the words "curator of the estate," for the reason that the original petition set forth the representative capacity of the plaintiff as guardian solely of the persons of the minors, and the defendant prepared to meet the case being prosecuted by the plaintiff in that representative capacity alone, and after the close of the plaintiff's evidence in amending to change the status in which she sues, the defendant relied upon the fact that there had been no guardian appointed but only a curator appointed, and then in permitting the amendment at the close of the evidence, changing the capacity in which the plaintiff prosecuted the action, and permitting the plaintiff to continue the case as curator instead of as guardian, is such a fatal variance in the representative capacity in which the plaintiff sues that the defendant is unable to continue its defense of the case, and will ask to have the case set over for a reasonable day to prepare to meet the case on the merits, and under the statute, the court, if satisfied either by affidavit or otherwise, that the defendant cannot safely proceed to trial, it has authority to continue the case. I think it ought to be continued at the cost of the plaintiff to enable the defendant to meet the changed issue. The original petition alleged the prosecution of the suit solely as guardian. There has been no appointment of the plaintiff as guardian, and I state to the court that I am not prepared to continue the defense of the case, and ask to have it continued or reset, anyway.

84 The Court: Granted plaintiff leave to amend her petition by interlineation, as above stated; to which action and ruling of the court defendant then and there at the time duly excepted and still excepts.

And the court overruled defendant's motion for a continuance; to which action and ruling of the court defendant then and there at the time duly excepted and still excepts.

Mr. White: If the court will require me to, I will file an affidavit, or will you overrule it regardless of the affidavit?

The Court: Yes, I overrule it just the same because I think under the statement of the petition I don't think you are misled.

Mr. White: Then on the statement of the court that it will be refused notwithstanding there will be an affidavit filed, I will not put the court to the inconvenience of preparing an affidavit, otherwise I will file an affidavit of surprise.

The Court: Let the record show defendant's application for a continuance is overruled.

Mr. White: Based on the ground of surprise, but not because I have not filed an affidavit?

The Court: No.

To which action and ruling of the court in overruling defendant's application for a continuance of this cause defendant then and there at the time duly excepted and still excepts.

Plaintiff here rested. Whereupon defendant requested the court to give an instruction in the nature of a demurrer to the evi-
85 dence, which is in words and figures as follows, to-wit:

The court instructs the jury that under the pleadings and the plaintiff's evidence, the plaintiff cannot recover and your verdict will be for defendant.

Which said instruction the court refused to give; to which action and ruling of the court defendant then and there duly excepted.

Defense.

Defendant to sustain the issues upon its part offered and introduced evidence as follows, to-wit:

JOHN H. LONEGAN, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. White:

Q. Your name is John H. Lonegan?

A. Yes, sir.

Q. You were switch foreman for the Missouri Pacific at the time Mr. Small was killed in the East Bottom yards?

A. Yes, sir.

Q. How long had Mr. Small been working there, Mr. Lonegan, prior to that time?

A. Well, I should judge perhaps about 75 days, or such a matter.

Q. What had you been doing just preceding the accident in which he was killed?

A. Well, we coupled up track No. 5, that is where they held the west stuff, was going to make up train 53.

Q. On what track were you making up train 53?

A. No. 9.

86 Q. About how far is it from track No. 9 to track No. 5?

A. About 150 feet.

Q. What were you using track No. 5 for at that time?

A. Well, there was some west empties mixed in among our west loads we was not going to use, and were holding them back in there on track 5.

Q. What had Mr. Small been doing just preceding the movement of these empties upon track 53?

A. Well, about five or six minutes before I noticed him on track 5, he was down about 15 feet east of No. 9 switch, and he had made a coupling to couple an iron B. & O. coal car onto a box car.

Q. On what track?

A. On No. 9.

Q. No. 9?

A. Yes, sir.

Q. That was 150 feet north?

A. Of No. 5.

Q. Of No. 5?

A. Yes, sir.

Q. Then where did you next see him?

A. Over on No. 5.

Q. What was he doing then?

A. He was dead.

Q. Prior to discovering him dead on track No. 5, had you given him any signals or orders?

A. No, sir.

Q. With reference to the cars on No. 5?

A. No, sir.

Q. Now, after you saw him on track No. 9 what was done in the way of switching cars on track No. 5?

A. Well, I kicked a cut down towards 9, just as I told you, just as I stated, and that left us take ahold of six empties that I was not going to use; we went back in with those six empties and the engine on track No. 5 bumped up against two more, and I gave the

87 man following the engine a sign to kick them in, and gave the engineer a signal to cut them up the line.

Q. You say you shoved six empties in on track No. 5?

A. Yes, sir.

Q. And they bumped against two cars on track No. 5?

A. Yes, sir.

Q. At the time that the six empties struck the two empties on track No. 5, was the engine attached to the six cars or not?

A. Yes, sir; it was coupled onto them.

Q. How long after the six cars struck the two cars did you give the signal to shunt or to kick the cars?

A. Well, gave it right away.

Q. At that time did you know that Mr. Small was between the two cars and the six cars?

A. No, sir.

Q. How fast were the six cars run in on track No. 5?

A. When we let loose of them?

Q. Yes.

A. I should — perhaps about five miles an hour, perhaps a little bit greater, but I don't think so; they ran just 14 car lengths after we let loose of them.

Q. When did you first discover that Mr. Small had been killed?

A. We started back on the lead there in order to straighten up our lead for train 153, and also 51 that we had switched in towards 11; switchman Kay looked over on No. 5 and he says to me, "John, look over there." I looked over there, it never once struck me about Mr. Small—I seen white garments there, it was his underwear, and I took it for a letter, my fancy, and so did the engineer, till I went over there, went over and examined and see what it was.

Q. What track were you on, then, when you discovered his body over there?

A. No. 9.

88 Q. How long after you shunted these six cars was that?

A. About five or six minutes, I should judge.

Q. As the six cars moved in on track No. 5 was there any obstruction between those cars and Mr. Small?

A. Mr. Small was on the opposite side to what we worked there.

Q. He was on the opposite side from where you worked?

A. Yes, we worked on the south side of the engine, he was on the north side, that is where we found him.

Mr. Cowherd: I want to object to that unless the witness says he saw Mr. Small there.

Mr. White: He says he found him.

Mr. Cowherd: Found him after he was knocked down and run over.

The Court: If he saw him and knows where he was.

Mr. White: He says after he was run over.

Q. Did you see him before he was struck on track 5?

A. No, sir; the last time I seen him he was over about 15 feet east of No. 9 switch on track 9.

Q. On track 9?

A. Yes, sir.

Q. Was he on the north or the south side of track No. 5 when you found his body?

A. On the north side.

Q. Which side were you on giving signals?

A. South side.

Q. The south side?

A. South side.

Q. You were on the outside?

A. South side, the opposite side, yes, sir.

89 Q. South side from where his body was found. Was there

anything to obstruct your view of it if he had been standing where his body was found?

A. He was on the opposite of the cars to me.

Q. Opposite side of the car?

A. Yes, sir.

Mr. Cowherd: That is, you mean from where the body was found?

Mr. White: That is what he says.

The Court: You mean this witness was on the opposite side of the car from where the body was found?

Mr. White: Yes, sir.

Q. As I understand you, the body was found on the northeast and you were on the south side of the track?

A. Yes, sir.

Q. I will ask you whether you had given any signal to Mr. Small to go in on track No. 5 and couple these cars and shunt them in?

A. No, sir; no, sir.

Q. Was it necessary to have those cars coupled up on track No. 5?

A. It was dead stuff, it was not necessary, no, sir; it was dead stuff, it was what stuff we was not going to use, they were all empties.

Q. They were cars you were throwing out?

A. Throwing back in, we were going to leave them, we were not going to use them at all.

Q. I will ask you how long you had been working for the Missouri Pacific Mr. Lonegan?

A. Since 15th of July, 1895.

Q. Here in Kansas City?

A. Yes, sir.

Q. How long have you been in charge of the switch yards there in the East Bottoms?

A. About six years.

90 Q. How long had Mr. Kay been working there for you?

A. Kay worked for me off and on about two years.

Q. I will ask you what your general rule or order to your men is with reference to coupling cars—dead cars such as that that you set out on the track, with reference to giving them notice or warning of the movement of cars—dead cars?

A. Well, the field men are supposed to——

Mr. Cowherd: I would like to know whether you mean whether that is a written rule or printed rule, or a verbal rule; I want to ask that question so as to know.

Q. Do you have a written rule governing the movement of cars in the freight yards, Mr. Lonegan?

A. No, sir.

Q. Do you give your men general orders and instructions in regard to it?

A. Yes, sir.

Q. Had you communicated any instructions or general orders to the deceased, Mr. Small, prior to the time of his death?

A. When we pulled off of track No. 5 I did, yes.

Q. What orders—I don't think the witness understands just exactly—I don't have reference to any signals you gave there, Mr. Lonegan, but to any orders or any general custom, if you had any, with reference to notifying them?

A. Well, it is customary, when you couple up a track, to tell the boys what you are going to do, and what you are going to use, and I always do that.

Q. You always do that?

A. Yes, sir.

Q. Had you done that with this man?

A. Yes, sir.

91 Q. You told Mr. Small?

A. Yes, sir; I told all of them. The last words that I told Mr. Small, and here are the very words that I said, I says, "Charlie," I says, "anything that we throw that are held back on No. 5, let them go to hell," that's exactly the words I used.

Q. Anything you threw in on track 5?

A. It was dead stuff, we was not going to use it at all.

Q. How long was that prior to the time you found his body there on track No. 5?

A. Oh, 20 or 25 or 30 minutes, I should judge.

Q. Where did you find the body with reference to the sixth car that the engine had pushed in on track No. 5?

A. Well, them cars had run up the line about fourteen car lengths where we let loose of them.

Q. Did you find any indications on the car to show where it stood, Mr. Lonegan?

A. Yes, sir.

Q. On which car?

A. On the fifth car from the engine.

Q. Fifth car from the engine?

A. Yes, sir; there was a piece of overalls and a piece of his jacket on what we call the bottom rod on the brake connection.

Q. Which end of the car was that at?

A. This was on the east end.

Q. That is on the east end?

A. Of track No. 5 east.

Q. Of track No. 5?

A. Yes, sir.

Q. Then it was on the farthest end of this sixth car that the engine had pushed in?

A. The fifth car.

Q. The fifth car?

A. The fifth car.

Q. Did you find anything on the end of this other car?

92 A. Between the sixth and seventh cars there was some vomit on the drawhead.

Q. Between the sixth and seventh cars you found vomit?

A. Yes, sir.

Q. Now, which end of the seventh car was that on?

A. On the east end.

Q. And these six cars were being pushed in from the——
A. From the east.
Q. From the east to the west?
A. Yes, sir; we were shoving them west.
Q. Then the vomit was found on the east end?
A. Of the seventh car, of the west end of the sixth car.
Q. Now, was there any custom, if you had known that he was in between the cars, to give him notice that these cars were coming other than the verbal notice you gave him?
A. I surely would not have shoved them in if I had known the man was going to get hurt, or was looking down the track, or was standing in the middle of the track, or anything like that, I would not have put them in there, that is, until we got him out.
Q. Do you take the applications of the switchmen?
A. Do I take the applications?
Q. Yes, do they file their application- with you?
A. No, sir.
Q. Did you ever see Mr. Small's signature?
A. No, sir; I don't know as I ever did.
Q. Don't know as you ever did. Do you know what his application—all the applications of the employees contain with reference to their looking out for cars?

93 Plaintiff's counsel objected to the question; the court sustained the objection; to which ruling of the court defendant then and there duly excepted.

Q. Do you know whether Mr. Small had been given any instruction by way of the superiors with reference to his duty to look out for his own safety in the movement of cars in the yard?

Mr. Cowherd: I want to object to that unless he had given them.

A. No, sir; I don't know anything about that.
Q. Did you ever give your men any instructions about that or about kicking, on the work about the cars?

Plaintiff's counsel objected to what instructions were given to these men, not what he gave. The court sustained the objection. To which ruling of the court defendant then and there duly excepted.

Q. Did you ever give Mr. Small any instructions with reference to looking out for his safety?
A. Why, no, no.

Plaintiff's counsel objected for the reason he has already answered.

A. He was a competent railroad man, had the name of being one of the best conductors on the river route, the brightest, I understand he had the name of being one of the brightest.
Q. How long had he been railroading?
A. I couldn't say, but I tell you what I have heard, I heard he was railroading in the neighborhood of about 12 years.

94 Q. Mr. Lonegan, if you had *seen* Mr. Small to open the knuckles on these cars after having given him the signal and told him that the cars were kicking in on that track——

A. Yes, sir.

Q. Is there any custom obtaining in the East Bottom yards where you have been foreman, to wait until he told you to bring the cars in?

A. Well, I would wait until I got a signal from him, yes, sir.

Mr. Cowherd: Wait, please, Mr. Lonegan. What was the answer?

A. I say I could wait until I got a signal from him to show if he was ready or not.

(By Mr. White:)

Q. To show if he was ready?

A. Yes, sir.

Q. And what had been your instructions to him with reference to the cars going in on track 5?

Mr. Cowherd: I object to that because he just answered it, told him to let them go to hell.

Q. Well, did that have any particular significance, would he understand by that, in other words, in your railroad practice, that he was to couple those cars up?

A. No, not absolutely.

Q. By the language you used?

A. No, sir; he could let them go, that is what I meant.

Q. That is what you mean?

A. Yes, sir.

Cross-examination by Mr. Cowherd:

Q. You say if you had *seen* him in there to do this coupling, you would have waited for a signal to shove them in before you pushed them in?

A. Yes, sir.

95 Q. You of course would not, any railroad man would understand that?

A. Yes, sir.

Q. This is a well established custom?

A. We work, according to signs; you hardly—sometimes you work for two hours at a time that we do not speak a word to one another, do it all by signals, pass it back and forth to one another.

Q. The truth is in the railroad yards—switch yards such as the East Bottom yard where there are a great many tracks and cars and passing trains, there is a great deal of noise and confusion?

A. Yes, sir.

Q. And you have to conduct everything by signals?

A. Yes, sir.

Q. Practically—and do so?

A. Yes, sir.

Q. Now, on the morning in question as you went down there your crew consisted of yourself as foreman, and Mr. Small, the dead man, was what you call the long field man?

A. Yes, sir.

Q. And Mr. Kay was the short—what do you call him—short field man?

A. Yes, sir.

Q. And Mr. Pipes followed the engine?

A. Followed the engine, yes, sir.

Q. And yourself, that constituted the switch crew?

A. Yes, sir.

Q. Of course, the engineer.

A. Engineer and fireman.

Q. Handled the engine, the switching crew is run by the foreman, isn't it, Mr. Lonegan?

A. Yes, sir.

Q. And he controls both the men who are doing the switching and the men who are handling the engine?

A. Yes, sir.

96 Q. And it is through his signals given to them and repeated through them, that all the work is done?

A. Yes, sir.

Q. And men, you say, frequently work for hours without a word being said?

A. They have.

Q. On this particular morning there was a train standing there on track 5, wasn't there?

A. Yes.

Q. When I say train, I mean a string of cars.

A. Yes, sir; a string of cars.

Q. That is right. I did not use the proper illustration—and these cars were coupled up?

A. Well, we went in and coupled track 5 up ourselves.

Q. You did go in and couple them up?

A. Yes, sir; we went in and coupled up 42 cars, all told.

Q. Coupled them all together, and you pulled them out on what you call the lead?

A. Yes, sir.

Q. Will you point out on this map what you call the lead; this map is Exhibit 2.

A. There is the lead, right along there (indicating on map Exhibit 2).

Q. Now, that the jury may understand it, the lead is a track running northwest and southeast?

A. Yes, sir.

Q. A long track, from which the switch or spur tracks run off?

A. Yes, sir.

Q. Ever so many feet?

A. Yes, sir.

Q. And to get from one spur track to another, like say going from 9 to 5, you would pull out from 9 onto the lead?

A. Yes, sir.

Q. Run until you got up past 5?

A. No. 5.

Q. This is the switch leading into 5?

A. Yes, sir.

97 Q. Then the switch would be thrown on the lead and you would come back and come down on 5?

A. Yes, sir.

Q. And on this particular morning you were taking this string of 42 cars off of 5, setting the loaded cars in on 9, were you?

A. Yes, sir.

Q. And putting the empties in on 5?

A. Back on 5.

Q. Now, you said that Mr. Small had been over there and made the coupling on 9?

A. Yes, sir.

Q. He threw the switch for that coupling?

A. He threw the switch?

Q. Yes.

A. Mr. Kay, off of No. 5.

Q. Mr. Kay?

A. Yes, sir.

Q. That is, he threw the switch passing on to 5?

A. Off of 5 down the lead towards 9.

Q. Well, wait a minute; let me get at it. In order to make that transfer of cars from track 5 to 9 you first had to pull off of 5 and pull towards the southeast to get onto the lead?

A. Pull up the lead, yes, sir.

Q. He was standing at the switch at 5 to properly throw the switch so you could come in onto the lead?

A. Well, it was set for us until he backed in, to couple on 5, No. 5 switch was set for the lead all the time till we pulled out.

Q. All right, but let's get at it. Now, when you did pull out was there anybody changed the lead, or did you come—I mean the switch—the 5 switch when you pulled out with those cars?

A. No. 5 switch was set for the lead so we could not pull out there without running through the switch.

98 Q. Was there anybody at the switch?

A. Not that I know of, no, sir.

Q. So that the switch was set when you pulled out so that the cars would pass over and the engine pulled them on out to the southeast?

A. Out on the lead, yes, sir.

Q. Now, then, in order to go down the lead to 9 somebody had to change that switch?

A. No. 5.

Q. Or else when you came back you would go back on 5?

A. Yes, sir.

Q. Who changed the switch that time?

A. Mr. Kay.

Q. Mr. Kay. Now, then, when Mr. Kay changed that switch the cars went on past down the lead?

A. Yes, sir.

Q. Now, who changed the switch or set the switch down at 9 so that they would go onto 9?

A. It was already set, we had our hind end—had the caboose and the hind end right over it.

Q. Then you mean you had been in 9 before?

A. On 9, yes, sir; I throwed out 53's caboose on 9, and 51's caboose on 11, before I went in on 5.

Q. Was there anybody down there at that switch?

A. At No. 9?

Q. Yes, sir.

A. Mr. Small was down there.

Q. Mr. Small was there, and you went in there and left some cars in there, didn't you?

A. I kicked some down the lead down towards 9, yes, sir.

Q. Now, you put some cars in on 5?

A. Yes, sir.

Q. Do you remember how many cuts you put in on 5?

A. Three or four, all told.

99 Q. Now, I am talking now about before you took the six cars down, the time Mr. Small was killed, how many cars had you put in on 5, do you know?

A. Previous to the six?

Q. Yes.

A. Why, about—we kicked one or two back, we kicked one or two car cuts back, and the two car cut made four.

Q. That is, you kicked two one car cuts, then?

A. Yes, sir.

Q. And one two car cut?

A. Yes, sir; in before we was in with the six.

Q. And when you put those in you kicked them in?

A. We did, yes, with the exception of the six.

Q. What is that?

A. With the exception of the six we had next to the engine.

Q. I say when you put these cars in you kicked them in?

A. Kicked them in on all the tracks, yes, sir.

Q. Now, so that the jury may understand, when a railroad man says in switching parlance that he kicks cars, it means——

A. To cut the car off and give it a kick.

Q. He gives a quick run with the engine so as to get them started to going good?

A. Yes, sir.

Q. Then cuts them loose and stops his engine?

A. Yes, sir.

Q. And then the momentum takes them on down the track?

A. Yes, sir.

Q. That is what is known as kicking?

A. Yes, sir.

Q. Now, after having put these four cars in, as you have
100 described, did you go down to put some cars on 9?

A. After we went in on 5 with the six cars?

Q. No, I am talking before you went in on 5—the movement before you came back to 5, did you put some cars in on 9?

A. Yes, I had a train in there.

Q. Well, but wait a minute, now, Mr. Lonegan, just let us understand each other. You have described now leaving your caboose over on 9?

A. Yes, sir.

Q. You have described putting these other cars in on 5?

A. Yes, sir.

Q. Now, then, after you put this two car cut in on 5, what did you do next with this string of cars?

A. We had some more for 9.

Q. You took some over to 9?

A. We kicked some more down towards 9; we kicked them down towards 9.

Q. You kicked them down towards 9. Do you know where Mr. Small was at that time?

A. He was down coupling up 9, keeping the train coupled up.

Q. Did you see whether anyone was at the switch?

A. At what switch?

Q. On 9?

A. No, the switch—it was not necessary for anybody to be there, the switch was set for 9.

Q. I mean if you saw whether there was anyone there; did you see whether there was anyone there?

A. No, that was the last place I seen Mr. Small at No. 9 switch.

Q. The last place you saw Mr. Small was at No. 9 switch.

A. Yes, he was about 12 or 15 feet east of it.

Q. What was he doing; you say he was 12 or 15 feet east of No. 9?

A. No. 9 switch, yes, sir.

101 Q. What was he doing there?

A. He coupled an iron coal car onto a box car.

Q. What was he doing there 12 or 15 feet of No. 9 switch?

A. That is where the two cars came together, they were standing right there.

Q. What was he doing the last time you saw him standing there?

A. He stood there to see the knuckles was properly opened and the cars was coupled; that was his duty, he was long field man.

Q. Now, when that coupling was made did you push the cars on east?

A. Not till after we went in and got rid of them six empties.

Q. Well, then, did you leave them fouling the lead track?

A. I did till I got rid of my six empties.

Q. So you did not push those cars down the line at all at that time?

A. Not at that time, no, sir.

Q. And you left whatever cars you cut off there partly on No. 9 and partly on lead?

A. And partly headed towards the lead.

Q. How many cars did you take off at that time?

A. I went back in on 5 with these.

Q. No, no, these cars that you left there when you went in on 9, the last time you saw Small.

A. How many cars did I leave there?

Q. Yes.

A. I only kicked one down there to him.

Q. You kicked one down?

A. Yes, sir; an iron coal car, after kicking that car down.

Q. What signal did you give?

A. I gave the signal for No. 5.

Q. Gave a signal for No. 5?

(Witness illustrating signal.)

102 Q. Well, did you just give a signal for 5?

A. Yes, sir.

Q. Nothing about what they were to do at all?

A. Who to do?

Q. The engineer or anybody else?

A. Well, we gave the engineer a sign for to go ahead and to pull up over 5 switch.

Q. You gave him a signal to go ahead and he pulled up over 5 switch?

A. Yes, sir.

Q. Then did you give him any signal?

A. I gave him a sign to back up after, you understand, he switched over 5.

Q. He backed up then, did he?

A. Yes, sir.

Q. So these cars, you had kicked over every car in that morning, according to your testimony, until you got to these, and then you backed up?

A. Yes, sir.

Q. Well, now, you must have given a different signal then, didn't you, at that time, from the others?

A. Different signal—how do you mean?

Q. Well, if the engineer had kicked all the other cars in on 5, and you say he did?

A. Yes, sir.

Q. On this occasion he did not kick them, but came backing up, holding them, did he?

A. The two cars that we went up against was not in far enough to justify to let loose of the six.

Q. I am just trying to find out about it. You gave a different signal, didn't you?

A. I gave him a signal to back up, yes, sir.

Q. That was not a sign to kick, was it?

A. No, sir.

103 Q. That is a different kind of a signal?
A. Yes, sir (illustrating).
Q. That is the signal. What is the signal to shove in?
(Witness illustrates.)
Q. That is what shoving in means?
A. Yes, sir.
Q. And what is the coupling signal?
(Witness illustrates.)
Q. So if you gave this signal and this, it means to shove in and couple up?
A. And couple up, yes, sir.
Q. And the cars—the empty cars that you put upon 5 that morning had been kicked in before you came with these six?
A. With the six, yes, sir.
Q. And you had to switch in again on down there to kick in two cars, and then you had gone down and left one car on 9?
A. I kicked one down towards 9.
Q. Kicked one—both the empties on 5 and the loaded on 9 had all been kicked until you came to these six cars?
A. Yes, sir.
Q. Now, when you came to the six cars you did not give a kick signal, but gave a signal—a shove in signal, didn't you?
A. Yes, sir, them two that were struck, just as I told you, wasn't in far enough.
Q. I want to get at this. Now, where were you, were you riding around with the engine or were you standing at one place directing this work?
A. I was walking right behind, about a car length from the engine, between 2, 4 and 5 on the south side.
Q. When the engine would pass down from 5 to 9?
A. I kept walking on down along with it, and up and down the lead with it.
104 Q. You walked up and down the lead?
A. Yes, sir.
Q. And around in between 4 or 5 and 9 and around the lead?
A. Yes, sir.
Q. And on which side of the lead?
A. On the south side.
Q. All right. Now, let's get that, let's turn this track, which is north here (indicating on map Exhibit 2)?
A. That is north.
Q. Let's see if there isn't anything here to show the directions—the directions seem to have been cut off.
A. Here is where you walk across just above the yard office, Milwaukee and Frisco.
Q. Well, this is towards the north, anyhow, towards the river?
A. Yes, sir.
Q. And where is your lead track now?
A. Right along here (indicating on map Exhibit 2).

Q. This is right, running right down here?
A. Yes, sir.
Q. Now, where is track 5?
A. Right along in here (indicating on map).
Q. Right out here?
A. Yes, sir.
Q. Where is track 9?
A. Run from 1 to 19.
Q. Down there, then you say you were on the south side, you were on the side over towards these spurs?
A. Yes, sir.
Q. When you gave this signal to shove in, these cars had pulled up and pulled beyond the switch, hadn't they?
A. Yes, sir.
Q. They had to pull beyond 5 switch before they could get in?
A. Yes, sir.
105 Q. And Kay was standing there at the switch to throw the switch?
A. Yes, sir.
Q. So when you gave the signal he was between you and the engine, wasn't he?
A. He was on the—the switch is on the opposite side of the track there, on the north side.
Q. I don't mean he was directly between you, but I mean the engineer had to pull his last car up beyond the switch, of course, before it could be thrown?
A. Sure.
Q. And after that you gave the signal for him to shove in?
A. Yes.
Q. And at that time you were standing——
A. I was on the south side and Kay was on the north side.
Q. Whereabouts were you on the south side?
A. I was out here (indicating).
Q. Well, you were here near the switch, you mean?
A. About two car lengths from the switch?
Q. And somewhere between 5 and 9?
A. 4.
Q. Between 4 and 9?
A. 4 and 5.
Q. Between 4 and 5?
A. Yes, sir.
Q. So you did not keep between 5 and 9 all the time, you got over between 4 and 5 at that time?
A. Shove in the six empties, to give the signal to shove in.
Q. Now, then, that map, let's see where 4 is—this is track 4, is it?
A. I should judge this is the main line, I suppose it is the main line, they run from 1 over.
Q. So that put you somewhere along about here?
A. I was about two care lengths, I should judge, west of 5 switch.
106 Q. West of 5 switch?

A. Between track- 4 and 5.
Q. Between track- 4 and 5?
A. Yes.
Q. You would not have any trouble looking down here, seeing a man, if there was any man down here in the neighborhood of these cars that had been put in before you would shove in?
A. I don't think so.
Q. No, you did not look down that way, did you?
A. I certainly did.
Q. You did look down there?
A. Yes, sir.
Q. Did you see these cars?
A. I sure did.
Q. And you gave a signal for the train to shove on in?
A. Back up, yes, sir.
Q. And that was not a kick signal?
A. No, sir.
Q. And it came shoving back?
A. Till we hit them two cars.
Q. And there was nobody in there to be hit at all, was there?
A. I couldn't see a soul.
Q. You could see as you came on back?
A. I could see.
Q. So you know this gentleman was not hit there—Mr. Small—at that time?
A. He was on the opposite side of me; I was on the south side and he was killed on the north side.
Q. I don't care whether you were on the south—just hold this up—I don't care whether he was on the south side or the north side?
A. If he was on the south side I could have seen him.
Q. Wait a minute. If you were standing over here, I said, between 4 and 5 and there were no cars between you, so you wouldn't
507 have any trouble seeing whether there was a man on the track, looking down there, would you?
A. Why, no, sir, I don't think I would.
Q. Of course not. Now, was there anybody on the track?
A. Not that I seen, no.
Q. Did you look and see?
A. I looked down there at them two cars.
Q. What is that?
A. I looked down there where the two cars was.
Q. And were the two cars moving?
A. No, sir.
Q. The two cars were standing still?
A. Yes, sir.
Q. When you looked down. How far had they run down?
A. About four or five car lengths, I should judge.
Q. That would be something like 150 to 175 feet?
A. I believe it was measured, if I remember correctly it was right in the neighborhood of 200 feet from the lead.
Q. In the neighborhood of 200 feet from the lead?

A. From the lead.
Q. And that would be less than 200 feet from you, where you were standing?
A. Yes, sir.
Q. And there was no trouble whatever in your seeing anybody down there?
A. Not a particle.
Q. And you gave this signal to shove in?
A. Yes, sir.
Q. And they shoved the cars in, didn't they?
A. Yes, sir.

Q. And how far did they get, the ends of the cars, by you
108 before you gave the signal to kick?

A. The car next to the engine?
Q. Yes, how far had the car, no, the first car—had the first car passed you?
A. The sixth car, you mean?
Q. The first car, the one that was going east—the eastmost car.
A. The east car, that would be the car next to the engine, well, I should judge——
Q. Well, the west car?
A. The west car—well, the end of that sixth, I should judge perhaps maybe about perhaps four car lengths.
Q. The end of the car had passed about four lengths?
A. Yes, sir.
Q. Then you gave the signal to kick?
A. After we hit them two cars.
Q. They then kicked?
A. Yes, sir.
Q. By that you mean started the engine going fast?
A. Yes, sir.
Q. And started to shove them down?
A. Sir?
Q. How long is a car?
A. Sir.
Q. How long is a car?
A. There is different lengths, there is 30, 34—there is 36, there is 40 and there is 50.
Q. The average freight car runs—that is, that you were handling on that morning, runs about how much?
A. 34 and 36 feet.
Q. 34 and 36 to the car. Now, after they shoved these cars down, they pulled them out, did you say, did they—the engine pulled out?
A. These empties?

Q. No, the engine pulled back out, did it?
109 A. We came out with the engine, with the light engine, yes, sir.

Q. Did you have anything on the engine after you shoved these six cars in?
—. No, sir.

Q. The engine had nothing on it?
A. No, sir.
Q. And where did it go?
A. Went down towards 9 to straighten up the lead.
Q. Did it get in on 9?
A. We shoved in on 9, yes, sir.
Q. What were you doing shoving in on 9?
A. Put the train in clear of the lead.
Q. Who was coupling up?
A. It was all coupled up.
Q. They were all coupled up?
A. Yes, sir.
Q. Well, did you shove them back?
A. Yes, sir.
Q. And then——
A. We started to shove back, Kay said to me, says, "John," he says, "look over there."
Q. And you had gone down there and started to shove back?
A. On 9, yes.
Q. And you had not noticed or paid any attention to where Mr. Small was from the time that you last saw him down there standing near track 9 until Kay called your attention to it after you went down and shoved on to this train on 9?
A. No, sir, I didn't see anything of him after that at all.
Q. And didn't look for him at all?
A. No, sir.
Q. Of course if you had known that he had come over to 5, attempting to couple anything there, you would not have given
110 this signal to kick in on 5, would you?
A. No, if I knowed he was in between the cars I certainly would not, no, sir.
Q. Well, if you had known he had gone over there to couple cars you would not have done it without looking to see where he was, would you, Mr. Lonegan?
A. No, not till I let him know.
Q. Why, of course not. So if anyone gave a signal for him to come over to couple those cars, they ought to have looked out for him before sending these other cars down in there, oughtn't they?
A. They should if he was sent over there, yes.
Q. Of course, Mr. Lonegan. Now, when you went over there where did you say—what cars did you say you found this evidence of vomit on?
A. Between the sixth and seventh car-.
Q. Well, by the sixth car you mean the car that was the wester'-most car of that last bunch?
A. The sixth and the east one that we hit of them two, yes, sir.
Q. That is, he was between the car which was standing on the track?
A. Yes, sir, and the sixth that we went in with the engine with.
Q. The first one that came in with the engine at that time?
A. Yes, sir.

Q. In what condition did you find the knuckles of these two cars, as to whether they were open or closed?

A. Well, the boss inspector came there with his two men and said they were all O. K.

Q. I am not asking whether he came and said they were all O. K.; I am asking whether those knuckles were open or closed?

A. I couldn't tell you.

111 Q. Didn't you look to see?

A. They were not coupled.

Q. If they had been open when those cars came together they would have coupled, wouldn't they?

A. Yes, sir.

Q. And you know they were not coupled?

A. Yes, sir, I know they were not coupled.

Q. So, either they were in proper position to couple or else there was some object there between them?

Mr. White: I object to that as argumentative and immaterial.

The court sustained the objection.

Mr. Cowherd: Well, this man is a man of long experience.

The Court: Yes, that would be argumentative—a conclusion of his.

Q. Now, where did you find his body with reference to where these cars stopped, these drawheads between those two cars, where you found the vomit?

A. How far from where these two cars was finally stopped?

Q. When the two cars stopped, I refer now to these two drawheads that showed the vomit upon them.

A. Yes, sir.

Q. How far was his body from that, how many car lengths back of them?

A. About ten or twelve.

Q. About ten or twelve car lengths back of them?

A. Yes, west.

Q. And could you tell how many cars had run over him?

A. Not exactly, no, sir.

112 Q. Of course all of the six cars must have passed over him in some shape, whether the wheels ran over him or whether the center ran ovr him?

—. The indication shows that, yes, sir.

Q. And part of them showed, or did his body show a part of them, the wheels had run across him?

A. Yes, you could see where he had been run over with the wheels.

Q. Did you send for the inspectors?

A. Sir?

Q. You speak of inspectors. Did you send for the inspectors?

A. The yardmaster did.

Q. When did he send for the inspectors?

A. When did he send for them?

Q. Yes, sir.

A. Oh, that is customary for them to inspect the cars.

Q. I am not asking that. When, I say, did he send for them?

A. Right away, I should judge, I couldn't say exactly, inside of a few minutes, though.

Q. When did the inspectors come?

A. Right away, they're all working right around there, right in the yard there, it touches one another.

Q. That is, I mean are they Missouri Pacific employes there?

A. The inspectors, yes, sir.

Q. That is all.

Redirect examination by Mr. White:

Q. Mr. Lonegan, explain the duties of the long field man with reference to the train you were making up on track 9—Mr. Small was long field man, was he?

A. Yes, sir.

Q. Now, what was his duty with reference to handling the cars on track No. 9 going in to this westbound tram?

113 A. To see that they were all coupled up.

Q. Did he have any duty to perform as long field man after your instructions to him on track No. 5?

A. No, sir.

Q. Now, where was Mr. Kay located?

A. Up at track 5 switch.

Q. Was Mr. Kay located where he could see Mr. Small if Mr. Small had gone over to the east end of these two cars?

A. No, sir.

Q. What would have kept him from seeing them?

A. The curve leading out of No. 5 onto the lead, track, No. 5 to the lead, there is a curve there.

Q. Now, why didn't you shove the six cars in, or why didn't you shunt these six cars in or lick them in?

A. Because there wasn't room enough.

Q. Because there wasn't room enough?

A. No.

Q. Was there room between the end of the switch after clearing the main line and these two cars, to have kicked the cars before they coupled the two cars or not?

A. You mean would the six cars clear the lead?

Q. Yes.

A. Why, just about, and that would be all. It is customary in switching to get your cars in a ways on the track so in order if a man comes along with two or three hot ones, you can drop one here or two there, or wherever the case may be.

Q. Now, if you kicked these cars in and it would clear the main lead, would you had to have gone back and shove them in again?

A. If they did not clear the lead?

114 Q. Yes, if they had not cleared the lead.

A. Why, I would.

Q. And that is the reason you didn't kick those cars?

A. Yes, sir.

Mr. Cowherd: I object to his arguing with the witness. I want to object to it as leading and suggestive.

The Court: He has already answered that question once, Mr. White.

Mr. White: All right, Your Honor.

Q. Mr. Cowherd asked you about the location of the body on the side of the car that you were on?

A. Yes, sir.

Q. Was this vomit on the draw bar of this car?

A. The vomit was on the drawhead, both drawheads, both cars.

Q. On both drawheads?

A. Yes, sir.

Q. What did that indicate to you?

A. Well, that it was a——

Mr. Cowherd: Wait a minute. Just a moment ago I asked what it indicated and the court would not permit him to answer. I submit, if the court please, it would simply be a conclusion of the witness.

The Court: Make the objection, and the court will pass on it.

(By Mr. White:)

Q. I will ask you if there had been room between the drawbars, whether he would have been struck if he had not been right in front of the drawbar there?

A. Would he have been struck?

Q. Yes, sir.

A. Why, no, not if he was not in there.

115 Q. Well, if his body had been in front of the drawbar.

A. You mean on the side of the drawhead?

Q. Yes, at the side of the drawhead.

A. Right here, say, for instance, those are the two drawheads (indicating), if he was standing along the side of it, why, no.

Q. He would not have been struck?

A. He might have been struck, but he would not have got hurt because there is room enough in between them two drawheads when coupled up, that a man can stand in there between the two cars.

Q. That is what I mean; now, if a brakeman is in the act of opening the knuckles of the car, does he stand with his breast against the drawbar, or does he stand to one side?

Mr. Cowherd: I want to object to that, if the court please. I object to that for the reason the question is where this particular man was standing, or where he ought to have stood.

The Court: Objection sustained.

To which ruling of the court defendant then and there at the time duly excepted.

Q. I will ask you this question, Mr. Lonegan, basing your answer upon your experience as a railroad man and as yard foreman of the defendant, whether an ordinary careful brakeman would stand where he would be struck by the drawbars of cars, coming together, after

knowledge of the fact that they were apt to be shunted together or shoved together, if he would stand to open the knuckles where
116 he would be caught between the drawbars of these cars?

A. No, I don't think so, I have opened thousands of them.

Q. How do you stand when you open them?

A. Why, I stand at the end of the car, I reach in with my hand and pull the knuckle open if it ain't in good operation.

Q. Would it be reasonably a safe act, or a dangerous act, for a man to stand with his breast against the drawbar of the car and his back in the direction that he knew a car was apt to be shunted or shoved, and attempt to open the knuckles with his fingers, with his breast against the drawhead?

Plaintiff's counsel objected to the question as an invasion of the province of the jury and an improper question. The court sustained the objection; to which ruling of the court defendant then and there at the time duly excepted.

Mr. White: We think it is a matter of expert evidence.

The Court: I don't think that is a subject of expert evidence. A man acts in different ways under different circumstances, acts foolish at times, one man might.

Mr. White: I will make my offer.

The defendant offers to prove by the witness that covering his experience as yard foreman since 1895, a period of many years, that as the foreman of the East Bottoms yards, that he is familiar with the peculiar construction of freight cars of all descriptions, and with the knuckles and coupling devices used upon the cars, and also that he is familiar with the risk and danger attendant upon the
117 coupling of cars being shunted or kicked in a railroad yard such as the defendant was operating at that time.

The Court: That is not what you are trying to show.

Mr. White: I was going to follow that up [illegible] that it would be dangerous——

The Court: That was not the objection.

Mr. White: That is part of his qualification—and that it would be dangerous and attendant with great risk for a switchman to stand with his breast against the drawbars of the car, or walk with his body against the drawbar of the car with his back in the direction that he knew cars were apt to be shunted or shoved against the car that he was walking against or was standing against, and that no reasonably careful switchman would attempt to open the knuckles of the car in that manner.

Mr. Cowherd: I submit, if the court please, that the defendant ought to ask his questions.

The Court: That is an entirely different question from what I ruled on.

Mr. White: Instead of making this as an offer I will ask the question, I will ask this in the form of a question.

The Court: I let him testify to all his qualifications—that is competent, but you go ahead and ask on that, and then ask him to tell whether it would be negligence for a man to do that.

Mr. Cowherd: I did not make any objection that he is not qualified.

118 Mr. White: I make my offer in that form.

The Court: Part of it is subject to admission. I permit this man to testify about his action at length, and how he handled those cars, I let him testify to that, but that last part is a conclusion.

Mr. White: I mean to make this offer cover both his qualifications and the other.

The Court: There is no objection to his qualifications.

Mr. White: If there is no objection to his qualifications I make the offer then in this form:

The defendant offers to prove by the witness that it would be extremely dangerous and hazardous for a switchman to stand or walk with his body against the drawbar of a moving car or a stationary car and attempt to open the knuckles of such a car after knowledge on his part that other cars would be shunted or shoved against the car that he was engaged in opening the knuckles of and that in the opinion of the witness no reasonably careful switchman would do this.

The Court: Any objection to it?

Mr. Cowherd: I want to object to that portion of the question which leaves it to this witness to decide what is reasonable care or negligence under certain circumstances. I do not object to his testifying as to what is the custom, what is the proper way of doing the work.

The Court: Objection will be sustained.

To which ruling of the court defendant then and there at the time duly excepted.

Q. Mr. Lonegan, what is the proper way—customary way,

119 for a switchman to open the knuckles of a car, either moving or a stationary car, if he has knowledge or is given notice that another car is apt to be kicked or shoved against the car that he is opening the knuckles of.

Plaintiff's counsel objected to the question.

The Court: He has already testified about that but I will let him answer the question.

Mr. Durham: Just a moment, there is no evidence here that the deceased had any knowledge they were apt to be kicked in.

Mr. White: I said "or shoved in."

Mr. Durham: He said kicked in or shoved in.

Mr. White: Kicked in or shoved in, either way.

The Court: Answer the question.

A. Give the lever a jerk, I always do.

(By Mr. Cowherd:)

Q. What is that?

A. Just jerk the lever, if it is in good working order the knuckle will fly open.

(By Mr. White:)

Q. Suppose the lever does not work the knuckle, then what is the

proper and customary way for the switchman, and how should he stand in opening the knuckles?

A. Stand at the end of the car. I say, get hold of the lever and work it, and reach in, if the knuckle won't work automatically, reach in and pull it out with your fingers.

Q. Can you do that and stand at the end of the car?

A. Yes, sir; do it every day.

Recross-examination by Mr. Cowherd:

Q. Why, you said if the switchman had gone in there under
120 orders to go in and make the coupling, with the knowledge of the fact that the cars were being shoved in, that he had a right to expect a signal before the cars would be shoved up against him, didn't you?

A. Yes, sir.

Q. Now, then, if the switchman goes in there, ordered in there, and knowing that they ain't going to shove cars up against him until he gets a signal, then he goes and works with the knuckle whatever way it may be necessary, don't he?

A. Yes, sir; he was not sent there, not in this particular case.

Q. We are talking about expert testimony now.

A. Yes, sir.

Q. If, however, if he had been sent there under signal to make the coupling?

A. Yes, sir.

Q. And the signal had told him that cars would be shoved in there under control of the engine, and had found the knuckle hard to work, he would have had a right to take any position he pleased, knowing he would have a signal before the cars would be brought together, wouldn't he?

A. I know, but you ain't supposed—a man ain't going to put himself——

Q. Answer my question.

Defendant's counsel objected to the interruption.

A. A man ain't going to put himself in danger, that is I ain't.

Q. He would not have been in any danger, would he, if he had a right to rely upon the signal?

Defendant's counsel objected to the question as argumentative.

121 The Court: It would be argumentative, Mr. Cowherd, that is a conclusion.

Q. That is exactly the reverse, I am just going to try to ask as near as I know how, the reverse of the question he asked. I will frame it differently. You have testified that the proper way for a man to work with that knuckle would be to stand out to one side if he knew cars were following to couple on?

A. There is a lever on the end of each car, you know.

Q. Yes, but the levers don't always work, do they?

A. No, sir.

Q. You just testified that you had to go in dozens of times and open the knuckles, haven't you?

A. Yes, sir.

Q. And you do that every day, don't you?

A. Yes, sir.

Q. Now, then, you say the proper way is for a man to stand out to one side and work them?

A. You do; that is the proper way.

Q. But if a man was sent there under an order by which he know that before any car would be brought against him he would get a signal, or else they would wait until he gave a signal to bring them up, then he would work at it, you say, any way he pleased?

A. He surely would, as long as he was working under my instructions, I would wait until he gave me the sign.

Q. And he would know you would?

A. Yes, sir.

Mr. White: I object to that because the witness has not qualified as a mind reader.

Q. Now, you say Kay could not see down track 5 from where he was standing?

A. No.

122 Q. Why?

A. On account of the curve.

Q. On account of the curve? Well, was that all that was bothering him?

A. That is about all.

Q. How?

A. That is about all.

Q. No obstruction of any kind?

A. No, sir.

Q. No cars in the way?

A. Nothing, only them six.

Q. Nothing but them six? Now, let's see—just hold that so the jury can see (handing plat to witness). This, you say, is the switch for track 5 where Kay was standing?

A. Yes, sir.

Q. You say that the engineer pulled his engine and cars up, he pulled the last car beyond that switch?

A. Yes, sir.

Q. What was there to prevent Kay looking down track 5 there?

A. On account of these cars leading off of the lead onto track 5.

Q. I don't care how much of a curve, suppose it was a right angle, would there be anything to prevent his looking down track 5 if the cars had all gone past him?

A. All gone past him?

Q. They all had to go past him, didn't they?

A. Yes, sir.

Q. Now, after they had all gone past him what was there to prevent his looking down track 5?

A. Nothing.
Q. There was nothing?
A. He was standing up on 5 switch.
Q. And there was nothing to prevent his looking down track 5, was there?
A. No, sir; not after the cars went in there.
123 Q. No, before they went in—now let's not get mixed up about this—just wait a minute—now, Kay was standing here at this switch?
A. On the north side.
Q. On the lead?
A. Yes, sir.
Q. And the engine and cars pulled up east and south of him, didn't they?
A. Yes, sir.
Q. That left the whole thing open here to the west, didn't it?
A. Yes, sir.
Q. And there was nothing then to prevent his seeing them?
A. Down track 5, that is before we shoved in there, no, he could see them.
Q. Of course not. Now, then, you say when you came back and backed in there, you backed in there that way (indicating on plat)?
A. Yes, sir.
Q. Came down here?
A. Yes, sir.
Q. Does this correctly represent that situation there?
A. Pretty near it.
Q. And that is the place where you went down, this track here?
A. Track No. 5, yes, sir.
Q. And that is this track represented here?
A. Yes, sir.
Q. And you say that you would not, of course, leave cars foul the lead, that is the reason you didn't kick these cars in here, just barely room enough to clear the lead?
A. Oh, probably about a car length, I should judge.
Q. You know then that you kicked them in?
A. That would have been a car length.
Q. But it would have cleared the lead by a car length?
A. Yes, sir; I should judge just about.
124 Q. But this one down on No. 9 that you kicked in there, did not clear the lead at all?
A. No, there was a train there somewhere, wasn't there?
Q. You didn't clear the lead down No. 9 at all?
A. No, sir; not the last of it.
Q. You kicked that car in, didn't you?
A. I kicked it on the lead, yes.
Q. You kicked down the lead?
A. Down towards 9.
Q. And let it run in onto 9, and it did not clear the lead?
A. No, sir.

Q. And you went off and left it?
A. Yes, sir.
Q. And there was room enough to have kicked these others in, that would have cleared the lead, but you shoved them in this time, didn't you?
A. Yes, sir.
Q. Your experience has not been such as to tell you how a man will fall when he is hit by a car, has it?
A. Oh, you are liable to fall most any way.
Q. In order to tell which way a man will struggle when he is hurt by a car?
A. No, sir; I have been in some pretty tight places myself.

Redirect examination by Mr. White:

Q. Mr. Lonegan, how long after you had pushed these six cars in and connected with the two cars was it that this man Kay told you over on track No. 9 "you have struck a man over there, there is somebody over there," how long after that was it?
A. About five or six minutes.
Q. How long had you been with Kay prior to the time that he made that remark calling your attention to this dead man?
A. Calling my attention?
125 Q. Yes.
A. Kay says, "John, we shoved in on 9 track, this train is on 9 to clear the lead."
Q. Did he go down with you?
A. If I ain't mistaken he was on the footboard, yes.
Q. Were you on the footboard with him?
A. Yes, sir.
Q. When you got on the footboard did he say to you, "Why, you ought not to have given a signal to shove the cars, after you told him to go in there"?
A. No, sir.
Q. Say anything of that kind to you?
A. No, sir. We started to shove in on track 9; Kay looked over towards track 5; he said "John, lookie there."
Q. Did he say anything to you at all that indicated that you had done anything wrong there at the time?
A. No, sir.

Recross-examination by Mr. Cowherd:

Q. Your switchmen usually correct you, do they, when you give signals?
A. No, sometimes they do, they contradict one another once in a while, yes, sir.
Q. They contradict one another once in a while but did they come to you and tell you you ought to do this and ought to do that?
A. What's the use, there is the cut.
Q. Well, as a matter of fact, you control your switchmen, don't you?
A. Yes, sir.

Q. You give the orders?
A. They are working under my instructions, yes, sir.
Q. Now, you say Kay rode with you down on the engine?
A. If I am not mistaken; I would not be positive about that.
126 Q. And that distance is about how far?
A. About 150 feet.
Q. About 150 feet, and how fast was the engine moving?
A. Three or four miles an hour, I should judge.
Q. And you think it took you five or six minutes to go that 150 feet?
A. I mean from the time we came off of track 5 was just about five or six minutes.
Q. Did you time anything?
A. No, sir; I did not.
Q. You were not keeping any time of these movements?
A. No, sir.
Q. When was it you told this man to let the cars on 5 go to hell?
A. When we pulled out of track 5.
Q. That was the first time, when you first pulled out?
A. I told him the empties we was going to shove back in there; I says, "Charlie, anything we shove back on 5, let them go to hell."
Q. Did you tell anybody else that?
A. No, sir.
Q. Did you tell Mills that?
A. No, sir.
Q. Did you tell Kay that?
A. No, sir.
Q. Now, you stationed Charlie over on 9, hadn't you, four tracks away?
A. Yes, sir.
Q. And he could not do anything with the cars on 5 as long as he tended to the duties, where you put him over on 9, could he?
A. Why not?
Q. He was over on 9, wasn't he, coupling up those cars?
A. Yes, sir; that is the train we were making up.
Q. Notwithstanding he was four tracks away you told him to let these cars back on 5 go to hell?
A. Yes, sir.
127 Q. And you didn't tell it to anybody else there?
A. No, sir.

Q. That is all.

Redirect examination by Mr. White:

Q. Was there anybody else in a position to look after them?
A. I may have told Kay to, but I don't think so.
Q. Kay was handling the switch shanty?
A. Yes, sir.
Q. And the engineer Mills was handling the engine?
A. Yes, sir.
Q. There would be no reason to tell any but those handling cars?

A. No, sir.
Q. Pipes was the other field man?
A. He was the man following the engine.
Q. Did you tell him anything about them going to hell?
A. No, sir; not according to signals.
Q. Pipes was not taking care of the cars down in the field?
A. No, sir; he was following the engine; he was away up the lead.

Recross-examination by Mr. Cowherd:

Q. Small was not taking care of the cars on 5 either, was he?
A. I told him not to.
Q. I say was he?
A. I told him not to.
Q. You didn't tell Pipes not to?
A. It was not Pipe's duty.
Q. Well, it was not Small's duty to take care of the cars on 5, was it?
A. Yes, sir; I told him so.
Q. Let's get at that. Now, had you put Small over on 9 or
128 not?
A. I told him where I was going to make the train, yes, sir.
Q. No, sir; did you tell Small to go over and work on 9?
A. Yes, sir.
Q. Then why did you tell him to let the cars go to hell on 5 if he was four tracks away?
A. Because I suppose he tried to keep the cars all coupled up, it is a switchman's duty.
Q. It is a switchman's duty, on both tracks?
A. All tracks.
Q. On all tracks, and the other men would not keep any cars coupled at all?
A. It ain't their duty.
Q. You don't think any of the other men would attempt to couple any cars, do you?
A. Oh, we all coupled cars more or less.
Q. But did you tell any of the other men that coupled cars more or less, to let these cars on 5 go to hell?
A. No, sir; because they were not working in the field.

By Mr. White:

Q. That is the duty of the long field man?
A. Yes, sir.
Q. That is all.

At this point the further hearing of this cause was adjourned until tomorrow, Tuesday, March 19, 1912, at 9:30 o'clock A. M.

KANSAS CITY, MISSOURI, Tuesday, March 19th, 1912.

Court met pursuant to adjournment and the further hearing of this cause was resumed as follows:

129 JOHN H. LONEGAN, in continuation of his testimony, further testified as follows:

Redirect examination by Mr. White:

Q. Mr. Lonegan, when you left the stand last night we were talking about the rules and customs obtaining in the East Bottoms yards in switching cars—a drag of cars in on the track where switchmen were engaged in making couplings. I will ask you what, if any custom there is with reference to the engineer and fireman waiting for a signal to move a drag of cars upon a track where the switchman who is making the coupling is not located between the cars, but *in* in the open, where, after he had knowledge the cars were approaching and where he was located and in the act of making a coupling, where he could see the cars approaching, if there is any custom obtaining in that kind of a case?

A. No, sir.

Q. There isn't any custom?

A. No, sir.

Q. Why would the custom that you mentioned last night, where the coupling was between the cars, not obtain in the case that I have just asked you about?

Mr. Cowherd: That would be an argument. I objected to it because it is calling for a conclusion and opinion of the witness upon a matter that is a matter of argument and not testimony of an expert.

The court sustained the objection; to which ruling of the court defendant then and there at the time duly excepted.

Q. I will ask you, Mr. Lonegan, whether there was any custom that would have applied to Mr. Small after he had had knowledge
130 that a drag of cars was being pushed in on track No. 5, after he had been in the act of opening the coupler, that would have governed the movement of the cars or affect the movement of the cars in this instance?

Mr. Cowherd: All of this was gone over yesterday, it seems to me.

The Court: It seems to me you covered all of this yesterday, Mr. White.

Mr. Cowherd: We don't want to go over it all again this morning.

Mr. White: I don't think I asked that question, Your Honor.

The Court: It seems to me you went into it fully in regard to the custom there of handling cars, and the duties.

Mr. White: With reference to the act that he was performing at that time?

The Court: That is my recollection, about the different situation that the man was in.

Q. Well, I will ask you this question: Was there any custom obtaining in the yards of which you were foreman, that would have prevented the pushing or shunting of these cars against the two cars that they struck after Mr. Small had noticed that those cars were going to be moved in there?

A. No, not to the best of my knowledge, no, sir.

Q. That is all.

Recross-examination by Mr. Cowherd:

Q. Didn't you swear yesterday at least three times that if
131 this man was in there attempting to open a coupling, after you had given notice, didn't you swear three times yesterday that if this man had gone in there to arrange a coupling, and the cars were being shoved in, that he would have a right to rely upon the engineer waiting for a signal from him before he shoved the cars up against it?

A. If he knowed the gentleman was in there, yes, sir.

Q. And didn't you swear that if you had seen him in there, or given to him any signal to go in there, it would be your duty to see to it that these other cars that were coming down there were not pushed against him when he was attempting to operate the coupling?

A. I did, but I also told him to let those cars on track 5 go to hell.

Q. You also told him to let those cars go to hell, that is what you said?

A. Yes, sir; that is the expression I used.

Q. And didn't tell it to anybody else?

A. No, sir.

Q. Except the dead man?

A. It was not their duty.

Q. But if this man had any signal to go in there to couple cars and was there with his back to the approaching train or cut of cars, which cut he knew was being pushed in under the control of the engineer, then in accordance with the customs in those yards he had a right to rely upon the fact that the cars would not be pushed against him until he had given a signal that he was in the clear?

A. He didn't know he was there.

132 Q. Well, now that is not an answer to the question. I want my question answered.

A. Any time a man goes in between the two cars——

Q. I want my question answered yes or no.

A. And we see him, and he don't come out, why, then we know there is something wrong, and then we will investigate.

Q. I want my question answered yes or no. I think I am entitled to it; then if he wants to explain he can do so.

The Court: Do you understand the question?

A. Not particularly, no, sir.

(Question read by the reporter.)

A. Why, certainly; would not have shoved up against them two cars if we knowed he was in there.

(By Mr. Cowherd:)

Q. That is not an answer to my question.

A. That is the only way I can answer it, Brother.

Q. Didn't you say yesterday and haven't you said over and over on the stand that if you had sent this man in there to look after those cars and he was attempting to open a knuckle, and he knew that the cut of cars was being shoved in, then he had a right to rely

upon the fact that the cars would not be pushed against him until he gave a signal that he was in the clear?

A. That is very true, but he was not sent in there.

Q. All right, I am not asking that; that is all, sir.

Redirect examination by Mr. White:

Q. I will ask you this, if a switchman intends to open the knuckles of a car, and after knowledge that another car is going to be
133 moved against the car either by kicking it or shunting it, which is the safer method, to stand with his body against the drawbar, or to stand at one side of the drawbar?

A. Stand one side, of course.

Mr. Durham: That was gone over yesterday.

The Court: That same question was asked him two or three times yesterday.

Mr. White: Very well. That is all, Mr. Lonegan.

NEALEY A. FLAGG, called as a witness on the part of defendant, being duly sworn, testified as follows:

Direct examination by Mr. White:

Q. Your name is N. A. Flagg?

A. Yes, sir.

Q. You were assistant yardmaster in the east bottoms yard of the Missouri Pacific at the time that Charlie Small was killed?

A. Yes, sir.

Q. How long have you been railroading?

A. Me?

Q. Yes, sir.

A. Twelve years.

Q. How long have you been acting in the capacity of assistant yardmaster there?

A. A little over three years.

Q. How close were you to the tracks 5 and 9 at the time they were switching those cars?

A. Well, I was around through the yards, sometimes I was on track 5, sometimes I was on track 9.

Q. Had you noticed the signals that were given by Mr. Lonegan, before the discovery of the body?

A. Yes, sir.

Q. Tell the jury what the train crew—the switching crew had been doing in switching those cars in the yard there.

134 A. Why, they were making up what they call train 53 on track 9; the understanding was that they were to use the loads and not the empties. They coupled up track 5, that was the track which the stuff came down through which was used for this train 53, and there was ten empties in it all-told, and they was to throw those empties back on track 5, using the loads, switching the loads down towards 9 and 11, and the empties back on 5.

Q. How long had you known Mr. Small before that time?

A. Why, I had known him for probably a year.
Q. Was he an experienced railroad man?
A. He was an experienced road man.
Q. Did you see Mr. Lonegan give Mr. Small any signals during the performance of the duties that you referred to there?
A. Only in regard to track 9 and track 11.
Q. What signals did you see him give him?
A. I could see him give a signal for the drag tracks—in railroading there is a certain code of signals for all tracks, and I seen him give a signal for track 9 or track 11, whichever way the cut would be.
Q. What duties was Small performing prior to his death there?
A. He was what they call the long field man there and stands at a distance from the engine and make necessary couplings.
Q. What duties, if any, did he have to perform with reference to these cars that were switched on track 5—these empty cars?
135 A. Why, he would have none unless it would be to make a coupling of his own accord; the understanding was that he was not——

Mr. Cowherd: Wait a minute: I object to any understanding.
The Court: Objection sustained.
To which ruling of the court defendant then and there duly excepted.

Q. Did you ever give Mr. Small any instructions about those empty cars switched in on track No. 5?
A. Yes, sir.
Q. What instructions did you give him?
A. He was to pay no attention to the cars as we were not going to use them on this track.
Q. On that track?
A. Yes, sir.
Q. How long was that before his death?
A. When we coupled up the track, probably thirty minutes before.
Q. How long had he been acting as switchman there?
A. Well, I can't say exactly, but I think about three months.
Q. Prior to that he had been conductor?
A. Yes, sir.
Q. Freight conductor. Now, what had he been doing just before his body was found there, and where was he located?
A. He was located on the east end of track 9, he made a coupling on a car of machinery that was dropped towards track 9.
Q. That was the track upon which they were making up the train?
A. Yes, sir.
Q. Train 53?
A. Yes, sir.
136 Q. Did you see him there couple that car of machinery?
A. Yes, sir.
Q. Now, did you see Mr. Lonegan give any signal after that with reference to pushing the six empty cars back on track No. 5?

A. Yes, sir.
Q. What signal did he give?
A. Gave a signal like that (indicating); that indicates "shove in."
Q. On track 5?
A. Yes, sir.
Q. Did you see Mr. Small then?
A. Why, he was standing at the end of the cars on track 9.
Q. At the end of the cars on track 9?
A. Yes, sir.
Q. Was there any signal given him by Mr. Lonegan?
A. No.
Q. You were in charge of the movements of the men there as assistant?

Mr. Cowherd: I object to that. He has not testified to anything of that kind.

Q. What were your duties as assistant yard foreman?
A. Why, I was in charge of the trainmen.
Q. In charge of the train crew?
A. Yes, sir.
Q. Were you in charge of those men there?
A. Yes.
Q. Were they under your control and direction?
A. Yes, sir.
Q. Mr. Lonegan was foreman of the switching crew?
A. Yes, sir.
Q. Was this signal to back in on track 5 given to Mr. Small?
A. No, the signal was given for the benefit of the man following the engine; he had started towards the engine to cut the cars off.

137 Plaintiff's counsel objected as a conclusion of the witness and not a statement of any fact.

The Court: If he knows why it was given.

Q. Do you know to whom this signal to back in was given?
A. It was given to Pipes.
Q. Why was that true, why was it given to Pipes and not to Small?
A. Pipes had started towards the engine to cut the cars off, and Lonegan didn't want the cars cut off, so he gave Pipes a signal to shove in, so he would understand not to cut the cars off.
Q. Did you see the six cars connected up with the two cars?
A. No, sir.
Q. Where were you standing when they struck the two cars?
A. I was about opposite 13 switch on the train yard lead.
Q. Do you know whether the six cars were kicked before or after they struck the two cars?
A. I can't say positive.
Q. Which side was the deceased Mr. Small on when you saw him last, which side of track 5?
A. On the north side.
Q. If he had been performing any duties with reference to coup-

ling the cars there, what would have been the proper side of the track for him to have been on?

A. South side.

Q. Why is that true?

A. Because the engineer is working on the south side.

Q. Which side of track 5 was Mr. Lonegan and Mr. Pipes on?

A. South side.

Q. Could Mr. Lonegan or Mr. Pipes or the engineer have
138 seen any signals given by Mr. Small on the north side?

A. No, sir.

Q. Which side of the track was his body found on?

A. North side.

Q. What position was his body in when it was found?

A. The head and trunk of the body on the inside of the rail, his lower limbs on the outside or north side of the rail.

Q. I will ask you, Mr. Flagg, if there is any rule obtaining, or custom obtaining in the yard where you were assistant yard foreman, that would have prevented the shoving or pushing of those cars in upon track No. 5 after Mr. Small had notice that they were to be pushed in on that track, that would have compelled the engineer to wait pushing the cars until after receiving a signal from Mr. Small?

A. None, unless he had given a stop signal.

Q. Unless who had?

A. Small.

Q. Was he on the right side to have given a stop signal?

A. Not when I saw him.

Q. And where his body was found, track No. 5?

A. No, he could not have given no signal on the north side that they could have seen.

Q. Now, I will ask you, basing your opinion upon your experience as a switchman and as a foreman, which is the safer way to open the knuckles of a car, stand with your body against the drawbar, or stand to one side of the drawbar?

A. Stand to one side.

Q. Why?

A. Well, you would be out of danger of being caught by drawbars; the safer way is to stop the cars and then open the knuckle.

139 Q. Did you examine the drawbars of this seventh car and the sixth car with reference to any vomit or anything found upon the drawbar?

A. Yes, sir.

Q. What did you discover?

A. I discovered vomit on the drawbars of the sixth and seventh cars and on the air hose of the sixth car.

Q. Air hose of the sixth car. Did you find any of the deceased's clothes on the sixth car?

A. No, on the fifth car.

Q. On the fifth car. Did you find any evidences that the sixth car had passed over him?

A. No, sir.

Q. I will ask you, Mr. Flagg, basing your opinion upon your ex-

perience as a switchman, as a foreman, whether it would be considered a reasonably safe act for a switchman of experience to go between—to go in and place his body against the drawbar in the direction of a drag of cars that he knew was approaching or was apt to approach, and attempt to open the knuckles of the car in that position?

Plaintiff's counsel objected on the ground that there is no evidence to base that hypothetical question.

The Court: There is no evidence.

To which ruling of the court defendant then and there duly excepted.

Q. Did you discover any blood or any evidences on the drawbar other than the vomit?

A. See marks on the drawbar, whether it was blood or not I couldn't tell.

Q. What did the vomit on the drawbar indicate, if anything, as to the position that the deceased had assumed prior to his
140 death?

A. Well, it indicated he must have been facing south.

Q. And where was his body with reference to the drawbar?

A. His body was found in a position that would indicate that he had been facing south.

Q. I know, but was there anything—any condition there to indicate whether his body was caught with the drawbar or not?

A. The vomit on the drawbars.

Q. How is that?

A. The vomit on the drawbars.

Q. If he had been standing at the side of the drawbar would he have been crushed?

A. No, sir.

Q. Why not?

A. There was room between the cars—ample room, to have avoided crushing.

Q. Now, I will ask you, Mr. Flagg, basing your opinion upon your experience as a switchman covering the years that you mention, as a switch foreman and assistant yardmaster, whether it would be prudent or a rash act for a switchman to attempt to open the knuckles of a freight car by standing with his body against the drawbar of the car and back in the direction that he knew that other cars were approaching?

Mr. Cowherd: I want to object to that as an improper hypothetical question and no evidence upon which to base it.

The Court: I will let him answer.

Q. You may answer.

A. It would be a very rash act.

Q. Why is that true?

A. He would be unable to see the cars if he was working with the drawbar, to tell how close they were to him; it might strike him before he might have time to get away.

141 Q. Immediately after discovering Mr. Small's body did you examine the knuckles on the sixth and seventh car-?

A. Within ten minutes afterwards.

Q. What condition did you find the knuckles in?

A. Well, an operative condition.

Q. Could they be worked by using——

Plaintiff's counsel objected to the question as leading and suggestive.

Q. Explain what you mean by an operative condition.

A. In an operative condition that the pin lifters were connected and in good order, if you lift them they would open the lock blocks and perform the functions that they were supposed to.

Cross-examination by Mr. Cowherd:

Q. If I understand you, you say that from the position you found Mr. Small's body in you know he was on the wrong side of the car to give signals?

A. Yes, sir.

A. They were being shoved in with the engine and the two cars that were on the track were about seven car lengths from the east end of track 5.

Q. About seven car lengths from the east end of track 5, and where did you find Mr. Small's body with reference to that point?

A. About 100 feet west of that.

Q. About how far?

A. 100 feet.

Q. About 100 feet west of that?

A. Yes, sir.

Q. So you say to this jury that when a man steps in and is struck between the cars and dragged 100 feet and run over by the
142 car, you can tell by the position his body is laying in at that time, where he was standing when he was struck 100 feet away?

A. I didn't say that I could tell.

Q. Well, didn't you say that the position you found his body in indicated to you where he was standing at the time he was struck?

A. It would indicate it, yes, sir.

Q. And that notwithstanding the fact that he had been dragged 100 feet and run over by the car?

A. Yes, sir.

Q. Is there any rule of your company that prohibits a man trying to get out when he is caught between cars?

A. None at all.

Q. Or trying to crawl out when he has been injured by being hurt by cars?

A. No, sir.

Q. And is there any regulation as to which side of the track he shall try to crawl out on?

A. No, sir.

Q. See if I understand you right. You said you were assistant yardmaster down there?

A. Yes, sir.

Q. Do you know how many yards that yard covers, how much territory?

A. Well, it covers considerable territory.

Q. Well, it runs from what points, let's get the points.

A. It runs, that east yard, or the train yard that I was in charge of, consists of 21 tracks, it runs.

Q. As assistant yardmaster you were in charge of what yards?

A. Train yards.

Q. The train yards?

A. Yes, sir.

Q. And that consists of 21 tracks covering what territory,
143 give it to us by east and west streets.

A. Why, about Topping Avenue, Oakley Avenue on the east and Clinton Place on the west.

Q. Give it to us in miles if you can?

A. Probably half a mile.

Q. So the tracks that you were in charge of, the switch yards, were half a mile long and 21 tracks?

A. Yes, sir.

Q. How many crews did you have working in there?

A. One regular crew.

Q. And how many extras?

A. Why, sometimes three or four, sometimes five or six.

Q. You have an assistant yardmaster in charge of each crew?

A. No, sir.

Q. Who is in charge of the crew?

A. Foreman, engine foreman.

Q. Well, when you say the engine foreman, that is the foreman of the switching crew?

A. Yes, sir.

Q. And that man was John Lonegan?

A. Yes, sir.

Q. And he had control of the movements of the engine and the movements of the men?

A. Yes, sir.

Q. And he did have that morning?

A. Yes, sir.

Q. Any work—much to do there on this particular morning?

A. Considerable work.

Q. What were you doing there that morning, Mr. Flagg?

A. I was superintending the making up of train 53.

Q. Do you superintend the making up of each train?

A. Yes, sir.

144 Q. Then you go with every crew that goes to help make up a train?

A. No, sir; I tell them what to get.

Q. That is what your superintendency consists of, in telling them what to do, isn't it?

A. And seeing that they do it.

Q. When you tell one crew what to do, you then go and tell another crew what to do?

A. Yes, sir.

Q. You then tell another crew?

A. Probably.

Q. And your business is to superintend the entire yards, isn't it?

A. The entire train yard.

Q. The entire train yard, yes. When did this crew begin working with this train that morning?

A. About 9 o'clock.

Q. When was Mr. Small killed?

A. Between 9 and 9:30 A. M.

Q. Wasn't he killed about some time about 8 o'clock?

A. No, sir.

Q. Are you certain about that?

A. Yes, sir.

Q. As a matter of fact, now, it is not very importatnt, I just want to test your memory, wasn't he killed and reported at 8:30?

A. What is that?

Q. Wasn't he killed and wasn't the killing of the man reported by 8:30?

A. No, sir.

Q. So you say that the crew didn't get in until 9 o'clock?

A. Not to switch them cars, no, sir.

Q. Well, when did they get into the yards, that crew on that morning?

A. 7 A. M.

Q. And what work did they go to?

A. Made up K. & A. local, train 91.

Q. Did you stand there and see them make up that train?

A. I generally do, I don't know.

145 Q. Did you that morning?

A. I can't say as I did that morning.

Q. Do you know what signals Mr. Lonegan gave that morning for making up that train, train 91?

A. No, sir; I can't say.

Q. What did the crew go to doing next?

A. They go to fill out on 53's caboose.

Q. Well, you say they go to fill out on 53's caboose?

A. They put a number of cars on there on account of there not being enough tonnage on track 5 to make a train.

Q. When did you begin watching Mr. Lonegan's signals?

A. Why, whenever I was around I watched them all the time.

Q. Of course, you watch what everybody is doing?

A. Yes, sir.

Q. You watch to see what the switchmen are doing and the foreman is doing and the engineer is doing, that is your work, isn't it?

A. Yes, sir.

Q. And you can remember the signals that any man gave down there on any particular day, can't you?

A. No, not on any particular day.

Q. You can't remember the signals that Mr. Lonegan gave on Monday of last week, can you?

A. He was not working there Monday of last week.

Q. Well, Tuesday.

A. He was not working there Tuesday.

Q. Well, any time he has worked there except this particular day?

A. Oh, some things draw my attention to it, such as accidents and one thing and another.

146 Q. After an accident happened, then whatever you may have been doing, you remember the signal the foreman gave?

A. Oh, a certain number of signals, not all the signals.

Q. Of course, whether you happened to be watching the foreman or watching somebody else?

A. I would not know unless I was watching the foreman.

Q. What is that?

A. I would not know unless I was watching him.

Q. Now, were you watching Mr. Lonegan this morning?

A. I happened to be at that particular time, yes, sir.

Q. How long a time did this operation and switching these cars extend over?

A. The cars on track 5 or what cars?

Q. This train that you speak of that you say they were switching out and bringing up that morning?

A. Train 53?

Q. Yes.

A. Why, it consumed in all a period of making up a little over an hour.

Q. And during all that time you stood there and watched Mr. Lonegan's signals?

A. Yes, sir.

Q. You had no other work calling you?

A. I had other work, but no other engine to perform the work with.

Q. Mr. Lonegan had been working how long in the yard?

A. Why, to the best of my knowledge he has been employed eight or nine years for the Missouri Pacific.

Q. Hasn't he been there since 1895?

A. I can't say, that was before my time.

147 Q. He has been there much longer than you have?

A. Yes, several years.

Q. A competent foreman there?

A. Supposed to be a competent foreman.

Q. But notwithstanding that, you stood there for over an hour to watch him, to see what signals he made?

A. Watch the run of the cars, I undoubtedly watched the signals while I was watching the run of the cars.

Q. Of course, when you were watching the cars run in a certain direction, you couldn't see what signals Mr. Lonegan was making unless he was between you and the cars?

A. I was not watching which direction the cars was running, I was watching to see that they did not make any improper cuts.

Q. You felt that the making up of that particular train that morning was so important that you attended to no other business but stayed there and watched Mr. Lonegan make signals?

A. I had no other business that I could tend to at that time.

Q. Well, and having no other business, and Mr. Lonegan being a man of the experience that he was and capability, you felt it was your duty to stand there and watch and see that he made the right signals?

A. It was my duty.

Q. And so you did that?

A. Yes, sir.

Q. You remember distinctly the signals that he made?

A. Yes, sir.

Q. Of course, now, then, you say he gave this signal to bring these cars, shove signal, in, when Mr. Small was over on track 9?

A. About the end of the cars on track 9, standing out-
148 side of the track between 8 and 9.

Q. Yes, he made the cut of the cars on track 9?

A. Yes, sir.

Q. And you were at what place?

A. I was standing on the lead between 8 and 9 switch.

Q. You were standing there on your beat?

A. On the lead.

Q. On the lead, I beg pardon.

A. I am not a policeman.

Q. You were on the lead between 8 and 9 switch?

A. Yes, sir.

Q. (Handing plat to witness.) That is Exhibit No. 2, and this track has been identified as track 5 and is marked that as the switch for track 5 on the lead. Now, you were down here somewhere between 8 and 9, then?

A. Yes, sir.

Q. On the lead?

A. Yes, sir.

Q. Where did you go then?

A. Down the track here to switch 13.

Q. So that I may see it, you kept right on down on the north side of switch 13?

A. I crossed over the track right here (indicating on plat Exhibit 2).

Q. Well, it don't make any difference where you crossed over; you kept going right down westwardly to 13?

A. Yes, sir.

Q. And you were there at 13?

A. Yes, sir.

Q. And there were no cars between you and the cars standing on track 5?

A. Yes, sir.

Q. Oh, were there?

A. Yes, sir.

149 Q. Oh, there were cars, I beg pardon.

A. The head end of this train on track 9 extended up here, so it would cut off my view from track 5, a certain part of track 5.

Q. Where was Mr. Small when you last saw him?

A. Standing at the end opposite the end of the cars on track 9, about the centerway between the rails and track 8.

Q. Standing still there, was he?

A. Standing still.

Q. And that was the last time you saw him?

A. The last time I saw him.

Q. He was standing there still. Do you remember testifying at the coroner's inquest?

A. Yes, sir.

Q. I will ask you if this was your testimony at that time: "The last I saw of Mr. Small, he made a coupling just about No. 9 switch and started over toward track 5 about the time they shoved in with six empties."

A. No, sir, he started over towards track 5 and stepped in the center of track 8.

Q. I will read this to you and ask if you made any statement whatever at that time about any stepping at all—or I will let you read it. I will ask you if that is not every word you said at the time you testified immediately after the killing of Mr. Small at the coroner's inquest?

Mr. White: We object to that method of examining the witness. If he wants to offer his testimony there is no objection.

The Court: Just read it.

150 Mr. Cowherd: You are entirely welcome to read it (handing a transcript at coroner's inquest to witness).

Mr. White: We have no objection, if you want to offer that testimony, and the verdict, Mr. Cowherd.

Q. Now, you think that you might get something out of that, do you?

A. I was looking for the place to see.

Mr. Cowherd: If there is any competent evidence there I have great confidence in your ability to put it in.

Witness: Is that it there, that you mean?

Q. Yes, sir, wasn't that your testimony at that time?

A. That is as far as my testimony went at that time.

Q. And your testimony at that time was: "The last I saw of Mr. Small, he made a coupling just about No. 9 switch and started over toward track 5 about the time they shoved in with six empties."

A. Yes, sir, he undoubtedly would not stay on track 9.

Q. And that was made just after this signal had been given by Mr. Lonegan to shove in?

A. Yes, sir.

Q. That is true, wasn't it?

A. What is true?

Q. I didn't understand what your answer was to my question.

A. What was the question?

Q. I withdraw the question; that is true if he answered the other question yes. Now, then, you went on down to track 13?

A. Yes, sir.

Q. And you say there were cars there between you, this whole train of No. 53 was in on 9, wasn't it?

A. Not all of it, no.

151 Q. Well, it was clear up to the lead?

A. Yes, sir, yes, sir.

Q. And even running out on the lead a piece?

—. Yes, sir.

Q. And running down how far to the west?

A. Probably thirty car lengths.

Q. Below 13 switch, anyhow?

A. Thirty cars, yes.

Q. So that—let's get it so the jury can see it—5—where is 9 switch (pointing on plat Exhibit 2)?

A. Right here (indicating on plat).

Q. Right here?

A. Yes, sir.

Q. Now, there was a string of cars standing in on that switch running up onto the lead?

A. Yes, right to here.

Q. And running up to the lead?

A. Yes, sir.

Q. And you were down here at 13 switch, down here?

A. (Pointing on map Exhibit 2.)

Q. And that string of cars was standing there between you and 5?

A. Between me and part of track 5; you see I would have a view of 5 from the end of that car up to the lead.

Q. From the end of these cars anything of 5 you could see would be simply that portion of it that was up near the lead?

A. Yes.

Q. You couldn't see any part of it down here where this man was hurt?

A. No.

Q. Now, do you know what signal Lonegan gave when the first cut was thrown in on 5?

A. Thrown in on 5?

152 Q. Yes.

A. Why, he gave a kick signal (illustrating).

Q. I beg pardon.

A. (Witness illustrates signal.)

Q. That meant what?

A. Kick the cars.

Q. Kick them in, and what signal did he give when the next cut was thrown in?

A. Kick signal.

Q. A kick signal. How many cuts were there in before these six cars went down?

A. Three.

Q. Three—well, what signal did he give for the third cut that was thrown in?

A. (Witness illustrates signal.)

Q. That is the kick sign?

A. Yes, sir.

Q. That means that the engine will take a little run into a car, going fast, and then throw it off and let it run down by momentum?

A. Yes, sir.

Q. But when they came with the six cars he gave a signal with both hands, that meant to shove in?

A. Yes, sir.

Q. That meant that they would not kick them in but would shove them in, the engine still being in control of the cars?

A. Yes, sir.

Q. Didn't you say in your direct examination a moment ago: "I saw Lonegan give the signal to shove in on 5; Small was at that time at the end of the car on 9?"

A. Yes, sir.

Q. Now, after refreshing your memory with the testimony you gave before the coroner's inquest, don't you think Small had started over to track 5, as you said there?

A. He had not at that time.

Q. Well, he did immediately after it?

153 A. He went away from the cars on track 9 and went over as far as track 8, and by that time he had went out of my sight, and I don't know where he went.

Q. Well, that was over towards 5?

A. That is the general direction was towards 5, yes.

Q. And you turned and went to 13?

A. Yes, sir.

Q. Did you back down 13, or did you walk with your face down?

A. I walked with my face down there.

Q. When you were walking towards the west, down towards 13 switch, Lonegan was up east of the lead near No. 9 switch, wasn't he?

A. Yes, sir.

Q. And your back was towards him?

A. Yes, sir.

Q. You were not watching for signals then from Lonegan, were you?

A. Not there, no, sir.

Q. And what he gave you don't know?

A. No.

Q. You say that it is the safer way for a man to stand to one side of the coupling when he goes in to open a knuckle?

A. Yes, sir.

Q. Now, really the safest way is not to go in at all, ain't it?

A. Well, if you don't want to railroad why, it would be the safest way.

Q. Do you have to go in and open those couplings?

A. Why, some of them you do, yes, sir.

Q. Well, that is a fact, isn't it?

A. You have to open some of them, yes, sir.

Q. There is a bar lever on the outside of the car—take it as though this end of the table was a car, there is a little lever
154 out here that is put there to work that open, isn't it?

A. Lifting pin, yes, sir.

Q. But it frequently happens that either the drawhead is mashed a little or it is jammed up, or the pin don't work, or the chain is too short or the chain too long, and you have to go in and open the knuckle, don't you?

A. All of them lift rods, you know, of couplers are not automatic to the extent of opening the knuckle.

Q. No—well, do you have to go in and open the knuckle at times?

A. Yes, sir, at times.

Q. And you do it?

A. Yes, sir.

Q. And it is done thousands of times?

A. Yes, sir.

Q. And in the process of switching yards, and especially where you are getting ahold of moving cars, and have to handle moving cars, a man cannot adjust his position to the same kind of nicety that he might when he takes a seat in the parlor, can he?

A. Hardly, no.

Defendant's counsel objected to the question and the answer and moved to have the answer stricken out as argumentative.

The court sustained the motion to strike out.

Q. I will strike out the parlor part—he cannot adjust his position to a nicety, can he?

Defendant's counsel objected to the question as usurping the province of the jury. The court overruled the objection; to which ruling of the court the defendant then and there duly excepted.

Q. That is true, isn't it?

155 Same objection by defendant.

Q. Did you answer the question?

A. No, I don't understand the question.

Q. I say when a man is working upon moving cars, and particularly cars moving up and down the track at the time he is working with a knuckle, he cannot adjust his position all the time, just to a nicety?

A. What do you mean by "a nicety?"

Q. Well, I mean that a man working upon moving cars attempted

to handle the knuckles when they are moving, he cannot always place himself in just exactly the best position as he would if the car was standing still and he had nothing else to do but go there and take his time to handle it?

A. Why, he probably cannot adjust himself as well as if the cars had been standing still.

Q. Of course not. And as a matter of fact the switchman working around the train yards works pretty rapidly, don't he?

A. Generally, yes, sir.

Q. A good deal of work to do, and got several men waiting on the men to do it?

A. Yes, sir.

Q. And you only had one man with that train that was making couplings of any kind?

A. That is all.

Q. And that was this man Small?

A. Excepting car inspectors.

Q. Well, but in the making up of the train, the handling of the train by that switch crew that reported there was only one man making any kind of coupling at all, and that was Mr. Small, that is right?

A. The car inspectors made the hose coupling.

Q. Well, I know, but that is a different thing entirely?

156 A. You mean coupling the cars only one man, yes sir.

Q. The jury may understand it, what you mean by hose coupling. If a train is all coupled up, then the car inspectors go along and couple the air hose for the purpose of keeping up the brakes; that is what you mean?

A. Well, they generally couple them up while we are making up the train.

Q. Well, was there any other man coupling the cars down there connected with that crew besides Mr. Small?

A. Not coupling the cars together, no, sir.

Q. Now, when you went back there were these knuckles closed or open?

A. Closed.

Q. The knuckles are in a proper position open, the way they are left?

A. Why, that depends.

Q. Well, when you uncouple cars, naturally the knuckles are expected to close?

A. Yes.

Q. And when that car is brought up, then, run against another car, if for any reason the knuckles are closed, they have to be opened, and couple up automatically?

A. Yes, sir.

Q. And that was the kind of knuckles on this car?

A. Yes, sir.

Q. But these knuckles when you went to examine them were both closed?

A. Closed, yes, sir.

Q. So when brought together they would not couple?

A. Yes, sir.

Q. And when the knuckles are closed that way a switchman has to go in on the track and open the knuckle if a coupling is expected to be made?

A. Yes, sir.

157 Q. Now, you say the vomit upon the drawhead indicated that the man had been facing the south?

A. Yes, sir.

Q. If the car was moving along to the south or southwest, and the man was walking, that is trying to open the coupling, he would have to face the position in which the car was moving, wouldn't he, the direction in which the car was moving?

A. Generally would, yes.

Q. He could not walk backwards and he could not very well walk sideways unless he was going very slow?

A. It all depends on which end of the car he was working.

Q. Well, if the car is moving along here to the west?

A. Yes.

Q. And the man is following them along there trying to open the knuckle, the natural position for him to face is toward the car he is working on, isn't it?

A. Yes, sir.

Q. And if other cars are being brought down that track, his back would be turned towards the approaching cars?

A. Yes, sir.

Q. Now, did not the vomit that you found upon the drawhead of the seventh car, which was the car standing in upon the track before the last cut was made, indicate that Mr. Small had been facing that drawhead at the time he was struck, or vomited, at least?

A. Well, I couldn't say as to that; the majority of the vomit was found on the west end of the sixth car, very little on the seventh car.

Q. Some on the seventh and some on the west end of the sixth?

A. Yes, sir.

158 Q. You don't know, of course, you didn't see Mr. Small struck?

A. No, sir.

Q. You don't know which way he turned or what efforts he made at the time of being injured, or immediately before, to get out, or anything about it?

A. No, sir.

Q. You said when you examined him you found the knuckles in operative condition?

A. Yes, sir.

Q. Do you mean to say that the coupling appliance was in perfect condition when you examined them?

A. It might not be in exactly perfect condition, but it was in an operative condition.

Q. That is all.

Redirect examination by Mr. White:

Q. Mr. Flagg, I will ask you if Rule 391 (*a*) in the defendant's printed book of rules, effective November 1, 1901, was in effect at the time the deceased was killed?

A. Yes, sir.

Q. Do you know whether all switchmen and other employes handling trains, in the movement of trains, were examined upon the rules—the special rules of the company?

A. All experienced switchmen are supposed to be when they take new men in——

Mr. Cowherd: Wait a minute. I don't think that is competent testimony as to what experienced switchmen are supposed to do.

(By Mr. White:)

Q. No, I will just ask you, for instance, Mr. Flagg, do you know whether Mr. Small had been provided with a copy of the rules
159 during his period of employment by the defendant?

A. I can't say as to whether it was supplied at the time or not.

Q. Did you take his application when he went to work?

A. No, sir.

Q. You knew that rule was in effect at that time?

A. Yes, sir.

Q. That is all.

A. W. Mills, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. White:

Q. Mr. Mills, you were the engineer in charge of the switch engine that was handling the cars at the time Mr. Small was killed?

A. Yes, sir.

Q. How long have you worked for the defendant Missouri Pacific?

A. How long have I worked for the Missouri Pacific?

Q. Yes, sir.

A. About 23 years.

Q. Explain to the jury what you had been doing just preceding the accident to Mr. Small and what movement of cars had occurred at the time that he was struck.

A. Well, we pulled a drag of cars off of track No. 5.

(By Mr. Cowherd:)

Q. How is that, I couldn't get you?

A. We were pulling a drag of cars off of track No. 5, the loads and empties; we were making up train 53 on track No. 9, westbound train, and we kicked the loads down the lead, and the empties back on track 5, and the last switch we made we kicked a load or two loads down the lead, and left us with six cars, empties, which went back on track No. 5, and I pulled up over the switch, and we shoved in,
160 there was two cars in there not very far from the lead, and we

came up to those two cars and shoved back a ways and then gave them a little kick and cut them off, and I went up over the switch and went down on No. 9 and shoved in, and then coupled onto No. 10.

Q. When did you first discover the body of the deceased on track No. 5?

A. After we had kicked six cars down No. 5 and gone down the lead to about No. 10—track No. 10, when I discovered him laying on track No. 5, south of where I was, south of No. 9.

Q. Now, were the cars kicked on track No. 5 before or after you struck the two cars — the six cars struck the two cars?

A. We went in there and shoved onto this first cut, and shoved back a little ways and then gave them a kick.

Q. Are you sure about that, Mr. Mills?

A. Yes, sir; we shoved in part of the way.

Q. Why did you wait to kick six cars until after you connected with the two, if there was any reason for it?

A. Well, for the simple reason those two cars was not in the clear of the lead enough to put those other six cars in the clear; you see we had six more cars to put in there, while those two cars was not in the clear more than about two car lengths, I should judge, so we had to kick up against those other cars and couple onto them, or come up against them, and then shove down a little ways and give them a kick.

Q. Now, before you pushed those cars in on No. 5 who had given you the signal to do that?

A. Who did?

161 Q. Yes, sir.

A. The foreman, Mr. Lonegan.

Q. Where was Mr. Lonegan standing?

A. He was standing about four or five car lengths from me on my right hand side on the south side of track No. 5.

Q. Up to the time of pushing those six cars up against the two cars had you seen the deceased, Mr. Small, at all on track 5?

A. I had not.

Q. Where was Mr. Kay standing when you pushed those cars in?

A. Mr. Kay, I think, was using No. 5 switch on the opposite side from where I was working.

Q. On the opposite side?

A. Yes, sir.

Q. He was on the north side?

A. Yes, sir.

Q. From where he was located on the north side could he have seen Mr. Small after you pushed the six cars in on No. 5 if Mr. Small had been standing near the drawhead of this seventh car, the east side of the car, east end of the car?

A. He couldn't see him.

Q. What would have kept him from seeing him?

A. The simple reason is on a curve and he had to get out quite a ways away from the switch before he would have seen him, because it was a curve.

Q. Where were you all when you discovered the body? Who all was present when you discovered the body?

A. Well, after we kicked those cars in there we went down the lead on No. 9 and shoved in. I believe two or three car lengths of the body, and then went on No. 10, and our foreman, Mr. Lonegan, was looking back, back on the car, and I happened to look right across to the south, and I seen the body laying across the track.

Q. Who was with you?

A. My fireman was on the engine.

162 Q. Mr. Pierce?

A. Yes, sir.

Q. What did you say—what was done then, not what you said, but what was done?

A. I says to my fireman, I says, "Lookie there, somebody laying across the track over there."

Q. Where was Mr. Kay then?

A. Mr. Kay and Mr. Lonegan had just been standing right at the end of the tank, the tank and car coupled on to.

Q. On the footboard?

A. No, they were on the ground.

Q. On the ground then?

A. At the footboard.

Q. Well, what did you do after you discovered the body?

A. I called Kay's attention, Mr. Lonegan was looking at the back on the car, and I says to him, I says, "Look over there," and he looked up there and he says to John, he says, "There is Charlie Small."

Q. What else did Mr. Kay do or say there at that time?

A. I didn't hear him say anything.

Q. Did he at that time, say that he had seen Mr. Small in there working with this coupler?

A. I never heard him say.

Q. How is that?

A. I didn't hear him say.

Mr. Durham: They have not laid any foundation for any such examination.

Mr. White: I cross examined Mr. Kay about it.

Mr. Cowherd: I want to object to the testimony as incompetent, improper and not impeaching in any way.

The Court: He has answered the question already.

Mr. Cowherd: All right, I will let it go.

Q. Now, Mr. Mills, you said that when the six cars had

163 passed the lead or passed the switch, that anybody standing on switch No. 5, couldn't see down on track No. 5 to the point where those two cars were?

A. No, sir; he couldn't stand on No. 5 switch and see down there.

Q. Now, explain from this map here why they could not after the cars would pass the lead switch, pass the lead track there, the switch to the lead track—this is the fifth track here—that would be the lead up there (pointing on plat Exhibit 2).

A. Here is the lead (indicating on plat).

Q. There is the lead.

Mr. Durham: This is not switch 5.

A. Here is switch 5 right here, here it is; well, there is the curve—that switch has, on this side of the track, on the north side—well, there is a very short curve there; now on 5 and 6 there is a switch leads off from track No. 5, it still makes No. 5 curve shorter than it would be if 5 ran any further itself; these run 1, 2, 3, 4, 5 and 6, there is one switch runs off the lead, then about a car length there is another switch that runs direct off from 1 main, this runs off from No. 5—that still made No. 5 curve shorter than it would have been if it had been on 1 track, and a man standing on No. 5 track cannot see a man down there because it is a curve there.

Q. After these cars were past the switch, the lead switch, going onto No. 5, being on the north side of that switch, he could not see down on track No. 5?

A. No, sir; then you see he throwed the switch, he throwed
164 the switch, I went down in on there about a tank length or more, I pulled up over the switch 5, he threw the switch and got on the back footboard and rode down here to No. 9.

Q. Mr. Kay did?

A. Yes, sir.

Cross-examination by Mr. Cowherd:

Q. Are you still in the employ of the Missouri Pacific Railway Company?

A. Yes, sir.

Q. Is Mr. Lonegan still with the Missouri Pacific?

A. Yes, sir.

Q. Foreman of switching crew?

A. Yes, sir; I suppose he is, he is working in spurts over there.

Q. And Mr. Flagg, the gentleman who just left the stand, is still there?

A. Yes, sir.

Q. And Mr. Pipes was also one of the switchmen that day?

A. Yes, sir.

Q. He is still with the road?

A. He has been off, I suppose he is; he is laying off, I guess.

Q. You saw him here yesterday?

A. Yes, sir.

Q. He's here this morning, isn't he?

A. Who?

Q. Mr. Pipes?

A. I have not seen him.

Q. You saw him yesterday, didn't you?

Mr. White: Mr. Pipes is not here, Mr. Cowherd; he is laying off.

Q. You have not seen Mr. Pipes down here?

A. No, sir.

Q. He was the other switchman there, wasn't he?

A. Yes, sir.

Q. He was the one that was following the engine, as you call it?
A. Yes, sir.
165 Q. Do you know whether Mr. Pipes is working for the road or not?
A. I suppose he is; I haven't heard anything to the contrary.
Q. He was the last time you heard of him?
A. Yes, sir.

Mr. Cowherd: I would like to have Mr. Flagg recalled, please.
Mr. White: You want to finish with this witness?
Mr. Cowherd: Yes, unless you admit Mr. Pipes is still in the employ of the road.
Mr. White: I don't know whether he is or not.
Mr. Cowherd: I would like to have Mr. Flagg recalled.
Mr. White: You can do that.

Q. And the engineer—what is his name—I mean the fireman?
A. Walter Pierce.
Q. He is still with the company?
A. Yes, sir.
Q. Those were the men that constituted that crew that morning?
A. Yes, sir.
Q. Now, Mr. Mills, you say you pulled a drag of cars, loads and empties, off of No. 5 that morning?
A. Yes, sir.
Q. And you put them down, part of them on No. 9?
A. Yes, sir; making up the Red Ball train for Colorado.
Q. Who instructed you or signaled you to put them on 9?
A. Well, we work by signals down there—my foreman.
Q. And who was your foreman?
A. Mr. Lonegan.
166 Q. Mr. Lonegan—what signal did he give you to put them in on 9?
A. Well, they have different signals, that is drag for No. 9.
Q. Well, what kind of a signal did he give you to put it back in on 9?
A. We were cutting them off, you know, he just gave a sign to give them a kick and cut them off.
Q. That is what I am trying to get. He gave you a sign to kick them in on 9?
A. Yes, sir.
Q. And you kicked certain of the cars in on 9?
A. We just kicked them down on the lead.
Q. I didn't hear you; if you let me finish my question, we will hear each other better. You did kick some of the cars in on 9?
A. Yes, sir.
Q. Then you pulled back up the lead, didn't you?
A. Yes, sir.
Q. And then he gave you a signal to kick some in on 5, didn't he?
A. He gave me a signal to shove in first for the first couple.
Q. Let's not get mixed up about it, so that we may understand. I

am talking about the first cars that you put in on 5, over there, you pulled the track out that morning?

A. Yes.

Q. We are trying to trace each step you made that morning.

A. Yes, we throwed two or three empties along the first time.

Q. I beg pardon, if you will answer my question we will get along so much faster. You have said you pulled the track out for the lead, and then which way—then put them in on 9?

A. Yes, sir.

167 Q. Kicking them in, that is correct, is it?

A. Yes, sir.

Q. Which way was your engine headed?

A. East.

Q. Your engine was headed east. Then you came back to No. 5, you came from No. 9 to No. 5, your engine ran up the way it was headed, didn't it, to the east? Do I make myself clear? You understand me, Mr. Mills?

A. Yes, I understand you, I think.

Q. Well, am I right, now, let's just get at the movements of your train that morning after you went to make up No. 53.

A. Yes.

Q. You first backed your engine in and caught hold of these cars standing on No. 5, didn't you?

A. We coupled up to the drag, about 25 or 30, and pulled them out.

Q. Well, when you say you pulled them out you pulled up here to the east, didn't you?

A. Yes, sir.

Q. Then someone had to throw this switch here for you?

A. Yes, sir.

Q. Then you would push back down here to No. 9 switch?

A. We don't when we get a bilg drag to shove, hardly ever shove in, we jus- cut them off, give them a kick and let them go.

Q. What did you do?

A. We kicked them off.

Q. In order to kick them off you have to start back and get a little run?

A. Yes.

Q. And you kick them suddenly so they will run down?

A. Yes, sir.

Q. That is the way, you do, is it?

A. Yes.

Q. And somebody here turned the switch and let them run in on 9?

A. Yes, sir.

168 Q. Then you pulled back up over No. 5 switch again, didn't you?

A. Yes, sir.

Q. And then what did you do?

A. Well, we throwed out two or three empties again, I believe.

Q. And when you say you throwed out, what did you do with them, do you mean you gave a little run and kicked them down 5?

A. We kicked those cars down 5, that was the first cut of empties that was kicked in on 5.

Q. It was two or three empties that you kicked in on 5?

A. Yes, sir.

Q. And you did that under orders from the foreman of your switching crew?

A. Yes, sir.

Q. And what kind of an order did he give you to indicate to you to kick those cars in?

A. Well, gave me a sign like that (indicating signal).

Q. Well, it is a quick sign like that?

A. Yes, sir.

Q. And that is what it means, ain't it?

A. Well, it means to give them a kick.

Q. That is it exactly.

A. He gives them a hard sign to kick hard or easy sign to kick them light.

Q. He gave you a sign to kick these cars?

A. Yes, sir.

Q. And you gave them a kick?

A. Yes.

Q. Then what did you do?

A. Well, we pulled on up over No. 5 switch.

Q. You pulled on up over No. 5 switch again?

A. Yes, and I think we throwed off about twelve or fifteen loads that was right together.

169 Q. Throwed off a lot of loaded cars together?

A. Yes, sir.

Q. When you say throwed do you mean kicked them?

A. Yes, gave them a little kick, and they run down the lead nice.

Q. Who gave you the sign to kick those?

A. The foreman.

Q. Then you pulled back up over this switch again, didn't you?

A. Yes, sir.

Q. No. 5 switch, and then what did you do?

A. I think we cut out two more.

Q. And someone gave you a sign, the foreman gave you a sign, didn't he?

A. Yes, sir.

Q. And you kicked those off, didn't you?

A. Yes, sir.

Q. And then what did you do?

A. Well, we kicked, I think cut off two or three more and kicked them down the lead.

Q. Kicked off two or three more loaded cars?

A. Yes, sir.

Q. And kicked them down the lead?

A. Yes, sir.

Q. Your foreman gave you a sign for that?
A. Yes, sir.
Q. And then what did you do?
A. Well, at that time I was below the switch and I pulled up, I had six cars.
Q. Didn't somebody give you a sign?
A. He gave me a sign to go ahead and put them in on 5.
Q. How did he give you a sign to go ahead and put them
170 in on 5, just show the jury.
A. Well, that is the sign (indicating); that is the sign to go ahead, and that is the sign No. 5 (indicating).
Q. Well, he gave you this kind of a sign, then, and he gave that sign?
A. Yes, for No. 5.
Q. Well, now, what did you do then after you got those signs?
A. We had a hold of the six bad order cars—six empty cars, and he gave me a sign then to back up and shove against this cut, and we shoved back a little ways.
Q. Now, let's see, just wait a minute.—I am getting at these signs, the first sign he gave you was the sign go ahead, and putting up his hands showing that you were to put these cars in on 5?
A. Yes, sir.
Q. And then the next sign he gave you was a sign showing how you were to put them in?
A. Yes, sir.
Q. And it was not a kick sign like the other had been, was it?
A. No, sir.
Q. It was a shove in sign, was it?
A. Shove in till we came to the first cut.
Q. Well, now, is there any sign that says shove in till you come to the first cut and then do this and do that?
A. Move by signs.
Q. Just show the sign he gave.
A. Well, he gave a sign like this, you know, to go ahead.
Q. Now, wait, he gave a sign like this and a sign like that (indicating).
A. Then when I shoved them down a little ways he gave me a sign.
Q. Wait a minute, let's get the sign, you just show the jury
171 the sign that he gave, show the jury the sign he gave.
A. Well, he gave a sign, just come up against them others slow, and he gave a slow sign to back up this way (indicating), till we come up to this cut.
Q. He kept giving this sign this way?
A. He gave me this sign till we come up close, would touch—couple onto them, come up against them, shove down a way, shove down a way; then he gave a sign to give them a little kick like, just like that, that done it.
Q. Have you given all the signs that he gave?
A. Yes.

Q. Now, did you say a moment ago he gave you a sign like this and a sign like that?

A. Didn't I give you that sign?

Q. Yes; you gave it just a minute ago.

A. He gave that signal to come up there against those cars.

Q. Now, just wait a minute; I want you to give to this jury the signs that you say he gave you.

Mr. White: I submit; he has done it three times.

The Court: Go on.

Q. You have no objection to doing it again, have you, Mr. Mills? Just give the signs again, if you please to the jury, explaining them as you give them.

A. Well, when we went in he gave a slow sign to come up there and shove in too, come up against this cut and then we shoved back a little ways, and then he gave a sign like this (indicating), to cut them off, and I done it.

Q. Now, you have not given there at all any sign like this (indicating) where you move your hands together, have you?

A. Yes, sir; I have.

172 Q. Well, now, then, my eyesight is very defective, Mr. Mills. I saw you give this kind of a sign (indicating), and then I saw you give this kind of a sign, and then I saw you give a cut off sign. Now, what other one did you give?

A. Well, I gave the signs as he gave them to me.

Q. Did he give a sign like this?

A. He gave a sign to come up against these cars to couple onto the first cut.

Q. Did he give a sign, you say he gave a sign to come up against these cars to couple onto the first cut?

A. Yes, sir.

Q. Well, now, that is what I want to know, and you saw that sign given?

A. He gave me the sign.

Q. Just answer my question. You say you saw that sign given?

A. Yes.

Q. And that was after he had given the sign for you to push in or shove in, whichever you call it, the sign that indicated to you that these cars were not to be kicked but were to be brought in by the engine?

A. No, he gave me a sign to give them a kick.

Q. Well, he gave you a sign first to bring them in?

A. Yes.

Q. With the engine, different from the kick sign, didn't he?

A. He gave me a sign to come in till we come up against that other cut.

Q. I say the first sign, though, was the sign for bringing the cars in?

A. Yes, sir.

Q. And then the next was the sign to couple up against the other cut?

A. Yes, come up against the other cut.

173 Q. And then you got the sign to kick. Now, Mr. Mills, you say after you kicked these cars in you pulled out and went over to 10?

A. Yes, sir; 9 and 10.

Q. And while your engine was standing on the lead at 9 or 10 switch did you see Kay?

A. Yes, sir.

Q. Did you see this man?

A. Yes, sir.

Q. Let's see if we can locate this properly. (Handing plat Exhibit 2 to witness.) Here is No. 5 switch, and after this kick you then pulled up again up over 5 switch, to get back onto the lead?

A. After which?

Q. After you kicked these six cars that you shoved in there.

A. On 5?

Q. On 5?

A. Yes, sir.

Q. You then pulled up over 5 switch to get back onto the lead?

A. Yes, sir.

Q. And then which way did you go?

A. West.

Q. Then went west down the lead to 10 switch, that is leaving about where?

A. That is No. 9, first we shoved in on No. 9.

Q. No. 9, then did you shove in there?

A. Yes, sir.

Q. Couple up, I say just shove in?

A. No, I think we shoved them in the clear.

Q. Then what did you do?

A. Then we went in on No. 10.

Q. Now, just to refresh your memory, wasn't it true that the last car which you had kicked down here to 9 fouled the lead, and you simply pushed it down past where it would foul the lead?

A. No, I think we gave a little kick and ran down.

174 Q. Then you did what, you went on down to 10?

A. Yes, sir.

Q. Well, where was 10—right there?

A. The next switch.

Q. That is right there at that point where I am holding my pencil, is it?

A. Yes.

Q. Where I make a little mark, and while you were standing there you saw this body over on the track?

A. Yes, sir.

Q. It was on No. 5, was it?

A. Yes, sir.

Q. And how far away?

A. Well, I should judge 200 or 300 feet, something like that, south.

Q. And was it under the car wheels or between them, or between the cars, or what?

A. It was laying right across the north rail, head and shoulders to the south of the inside track, and the rest of his body on the outside track, laying to the north.

Q. Some of you thought it was a woman?

A. I thought it was a woman.

Q. You thought it was woman, and you called Kay's attention to it, and immediately, he said, "that is Small"?

A. He said to the foreman, I believe he says, "There is Charlie."

Q. He said to the foreman?

A. Yes.

Q. You called their attention to this body laying there which you—you were up in your engine where you could see, elevated a little above the ground, weren't you?

A. Yes, sir.

Q. And looking over there at it you thought it was a
175 woman laying there; and you called their attention to it, and immediately Kay said, "That is Charlie"?

A. How?

Q. What?

A. How is that?

Q. I am just asking you.

The Court: He don't understand the question.

Q. I say isn't this the fact that when you saw this body laying there which you thought was a woman, you called the attention of Lonegan and Kay to this body, and Kay immediately said it was Small or Charlie; that is what he said?

A. Yes.

Q. You couldn't see the face at all at that time, could you?

A. Sir?

Q. You couldn't see the face?

A. No, sir; he was laying face down.

Q. And the way it was all mussed up you couldn't make out the figure?

A. You could see his face all right.

Q. Well, but I mean from where you were standing with the engine.

A. Oh, no; oh, no.

Q. One standing at that point couldn't tell unless they had known he was there, couldn't tell anything about who it was, could they?

A. No.

Q. These switches are worked by a lever, are they?

A. Yes, sir.

Q. What are they, stand switches or ball switches there?

A. Some are stand and some are balls.

Q. This 5?

A. Well, 5 is a stand switch, sometimes they get them broke and they put in a ball switch.

Q. And that the jury may understand it, this switch, you say, is on the north side of the track?

A. On the north side of the lead.

176 Q. The lead, and the switch is—the lever that works it is out four or five feet from the north rail?

A. No, it is about two feet.

Q. About two feet. Now, Kay standing there would throw that switch for you to go down 5?

A. Yes.

Q. You kicked your cars down 5, and that is what he did when you pushed in with this last string of cars, wasn't it?

A. I think he did.

Q. Then he would know from the signals the foreman gave what you were going to do next, wouldn't he?

A. Well, he would have to wait to get a signal to go if he was working on that side, he could not see where he was going next.

Q. Well, you knew that as soon as you put these empty cars up, you were going to pull back up to the lead and put the loaded car back?

A. I didn't know where he was going; I work by signs.

Q. Wasn't that exactly what you had been doing with that entire train that morning, putting the loaded cars on 9 and the empties on 5?

A. We might have had one on some other track and got a car before we went in there, for all I knew.

Q. That was what you had been doing right along with all the twenty-one cars that were shoved out, was that true?

A. Yes, we were switching that drag out.

Q. Well, anyhow the foreman did give a sign, didn't he, by which you went back up this place?

A. Back up which place?

Q. Back up over 5 switch?

A. We went down No. 9.

177 Q. What is that?

A. Down to No. 9.

Q. Didn't you have to go back over 5 switch again?

A. Pulled up over 5 about a tank length or a little bit more.

Q. You did pull back over 5?

A. After we took the car.

Q. And was Kay there then to set the switch?

A. I think he was, I couldn't see.

Q. The truth of the business is you didn't look, did you?

A. I couldn't see there on the north side.

Q. And you were not watching that thing at all?

A. But I knew when they pulled up over there the one for to throw the switch, and he was the only man to throw it.

Q. You know he had gone over there to throw it before?

A. Yes, sir.

Q. And that is all you did know about it?

A. And I know that he was the man that must have threw the switch, because——

Q. Just how close he stood to the track after you pulled over it, when you were shoving these cars in on 5, or where he went, you don't know, do you?

A. I know he was on the north side, I don't know whether he stood——

Q. I know he was on the north side, but whether he stood close to the track or whether he walked down the-e, or whether he walked out to one side or where he stood, you don't know, do you?

A. No.

178 Redirect examination by Mr. White:

Q. Kay is working for the railroad company now?

A. I couldn't say; I don't know.

Q. You don't know that he is working as a switchman for the Terminal Company?

A. He has been, but whether he is now or not I don't know.

Q. Now, Mr. Mills, what signs did he give you to indicate, or did the signs that he gave you indicate that you were to shove these six cars in until you struck the others, or did the signs indicate that someone was to go and couple up those cars?

Mr. Cowherd: I want to object to that as leading and suggestive, and an attempt to bolster up his own witness by the suggestion.

The Court: Objection sustained; it is leading and suggestive.

To which ruling of the court defendant then and there duly excepted.

Q. Was there any sign given there to Mr. Small by Mr. Lonegan that he should couple up the six cars to the two cars?

A. I never seen any.

Q. What did the signs that you gave to Mr. Cowherd when he was standing up before the jury, indicate to you?

A. It indicated to me that he—Mr. Lonegan was standing down there by these cars, he gave me a sign to come back up again then, you know, and shove them in.

Q. Did the sign given by you immediately after the back up sign, by putting the ends of yours fingers together, indicate that you were to shove over any particular time?

179 A. I took that for that he wanted to couple onto them and then shove in, and I came up there again, back slow.

Q. In other words, that you wanted to strike the cars?

Mr. Cowherd: I object to that, saying in other words, he said what he meant, I don't want you to explain it to him.

Q. Was there any signal given there, or did that signal mean that those cars were to be coupled together, or merely shoved until they were struck?

Mr. Cowherd: I object to that as leading and suggestive, the witness having three times stated that he took it they intended to be moved.

The Court: Objection sustained.

To which ruling of the court defendant then and there duly excepted.

Mr. White: I understand the witness to say just the opposite, that they were going to be shoved until they struck the cars.

The Court: The jury knows what the witness said.

Q. Now, I will ask you again, was there any signal given there that indicated that these six cars were to be coupled onto the two cars?

A. No, sir.

Q. What did the signal that he gave indicate to you?

A. Indicated that we should come up against those, yes, and if we came up against them, then we shoved back a little ways, and then cut them off.

Q. Had you struck those two cars before the kick signal was given you?

A. Yes, sir; I struck those two cars and shoved them back
180 when he gave me a little signal to give them a kick.

Recross-examination by Mr. Cowherd:

Q. Now, didn't you testify in response to my examination that he gave signals to you to push in with those cars and couple up?

A. Well, coming up again them was the same.

Q. Answer that question yes or *not*, and then you can explain all you please.

A. Well, that signal did not express to me to couple them up.

Q. I will ask you again, didn't you testify, and I submit, if the court please, I am entitled to an answer, yes or no, didn't you testify on cross examination a moment ago when I asked you the questions, that he gave you a signal to shove in with those cars and couple up?

A. No, he did not give me that signal.

Q. I ask you the question again if you did not testify—and I am entitled to an answer, yes or no——

The Court: He is asking whether you testified to that or not.

(By Mr. Cowherd:)

Q. Didn't you testify in response to my questions here just a few minutes ago that he gave you a signal to come in there and couple up with those two cars?

A. Well, he gave me a sign to——

Mr. Cowherd: I submit——

The Court: Just answer the question.

Mr. Cowherd: I am entitled to an answer to that question; that is the fourth time I asked.

Mr. White: I submit the record will show what he testified to, and he can explain what he meant.

181 Mr. Cowherd: I am entitled to an answer to it first, then he can explain.

The Court: Answer the question.

To which ruling of the court defendant then and there duly excepted.

A. No.

Q. You did not so testify. Didn't you say in response to a question asked you by Mr. White *at* three minutes ago or four, when he asked you what you thought he meant by that signal: "I took it that he wanted the cars coupled up"?

A. He didn't tell me, he gave me a signal——

Q. Just answer my question, please.

Mr. White: I submit that is not a proper cross examination. The record will show what the witness testified to.

Mr. Cowherd: I submit it is.

Mr. White: And the rules of the court require counsel to be seated at the counsel table in examining the witness.

The Court: Go on, no objection before the court.

(By Mr. Cowherd:)

Q. Didn't you say just a moment ago in response to Mr. White's question as to what the signal indicated that "I took it he wanted me to shove in and couple up to those cars"?

A. He gave me a sign.

Mr. Cowherd: I am entitled to an answer to my question.

The Court: Just answer the question, whether you testified to that or not—that is what the question is.

182 A. I can only tell you by his sign, that is all.

Q. I am talking about signals. I am asking what you said on the witness stand here a moment ago.

Mr. White: I object to the repetition of counsel as to what the witness testified to on his examination, for the reason that the record is the best evidence of what he testified to, and an unfair attempt to discredit the witness before the jury by putting a wrong construction upon his answers.

Mr. Cowherd: Now, Mr. White, you have no right to say that is an unfair attempt; I am putting no construction on it; I am endeavoring to quote the witness's words, as I remember them, and if I am mistaken the witness can say so.

The Court: Objection sustained for the reason it is just repeating what he testified to; his testimony has already been given, and the jury remembers what his testimony was. It is not necessary to repeat it over, whether he has testified to it or not.

Mr. Cowherd: If Your Honor please I may be mistaken, but my judgment is that when Mr. White asks him a question, and he answers an answer which I think is contradictory of the answers he has given just before, I think I have a right to ask him if he did not answer the other way.

The Court: If he has done so, it is in the record, and is before the jury.

Mr. Cowherd: I have the right to ask him and have him to explain why he gives the two answers contradictory.

183 Mr. White: A repetition of what he testified.

Mr. Cowherd: No, I am simply asking him to answer it once, if he will answer the question once I will not ask it any more.

Mr. White: I withdraw the objection.

The Court: Just answer the question.

(By Mr. Cowherd:)

Q. Didn't you say in response to a question of Mr. White a few moments ago, when he asked you what the sign given Mr. Lonegan indicated to you, that you thought he wanted you to shove in and couple up with those two cars?

A. Yes, he wanted to couple onto them, I guess.

By Mr. White:

Q. Now, you can explain, Mr. Mills, what you meant by that, by the language you used.

A. Well, in the first place, those two cars were all ready to couple up against, come against, was only about two car lengths from the lead, and we had six cars to go in there with, we had to come up to couple onto these cars, or come up against them and shove down a ways to clear the lead before we could cut them, being clear, you see, and then when we came up against those cars, I don't know whether I made the coupling or not, but we shoved down a little ways, and then he gave a sign to cut them off, to give them a kick. I gave them a little kick and cut the cars off.

184 R. D. Day, called as a witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. White:

Q. Mr. Day, are you in the employ of the Missouri Pacific?

A. Yes, sir.

Q. How long have you been working for them?

A. 1903.

Q. In what capacity?

A. Assistant chief clerk.

Q. Were you familiar with the signature of Mr. Charles H. Small?

A. Yes, sir.

Q. I will hand you his application dated 1st of November, 1909, as switchman, and ask you if that is his signature to it.

A. It is, sir.

Q. That is the original application?

A. Yes, sir.

Q. That is all.

Mr. White: Now, I will offer the application of the deceased as switchman.

Mr. Cowherd: There is a portion of this to which we want to object.

The Court: You mean where they waive liability?

Mr. Cowherd: That is the part I object to as incompetent; they

cannot contract against their own negligence. The part I desire to object to is, "The risk of which I assume for myself," and this last paragraph; and we object to the testimony for the reason that it is an attempt to rely upon a waiver of their own negligence—an attempt to contract against their own negligence which is against public policy.

Mr. White: Defendant here offers the entire printed and written application for employment by the deceased, Charles H.
185 Small, dated 1st day of November, 1909, and witnessed by M. J. Goddard, as constituting the contract of employment and regulating the relations and the duties of the deceased and the defendant, being the same written contract and application set up in the defendant's answer.

Said original application was marked by the reporter Exhibit 4.

Mr. Durham: We object to the introduction of that exhibit for the reason that it contains a great many matters that are wholly irrelevant, incompetent and immaterial, do not pertain to any issue in this case, and it contains other matters, which are void as against public policy, particularly that part wherein the employe assumes the risk of his employment as against the negligence of himself or his fellow employes.

The Court: This seems to be two separate contracts here.

Mr. White: I was making the offer first to include both the face and back of the contract.

Mr. Cowherd: That objection is certainly good to the thing as a whole.

The Court: Objection will be sustained.

To which action and ruling of the court in sustaining plaintiff's objection to the introduction of said original application for employment, marked Exhibit 4, and excluding the same, defendant then and there at the time duly excepted.

Said original application for employment, dated November 1, 1909, by Charles H. Small, excluded by the court, is in words and figures as follows, to-wit:

186 EXHIBIT 4.

Form 339. 8-09-30 M-D. D.

The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Railway Co. and Leased, Operated and Independent Lines.

Application for Employment.

Read Carefully.

No applicant will be permitted to enter the service until he has filled out and signed this blank.

All applications for employment as Conductor, Brakeman, Train Baggageman, Engineer, Fireman, Hostler, Station Agent, Dis-

patcher, Operator, Roadmaster and Section Foreman, Yardmaster, Assistant Yardmaster, Switchman, Switch Tender, Yard or Train Flagman, Shop Machinery and Bridge employes, Station Clerks and such other employes as may be hereafter designated, must be made in duplicate on this blank, by applicant personally. When the blank is filled out in accordance with the instructions herein, the applicant may be allowed to enter the services on Probation, provided there is need for his services, and he has passed a satisfactory examination, physical and otherwise.

Medical Examination.

The applicant will report to the Company's Chief, Assistant or Division Surgeon, for a Physical examination, before entering the service, report of such examination will be made on this form and sent to head of Department from whom received. It is
187 necessary to make tests for sight and hearing of all persons to be engaged in Train, Engine or Switching service, as well as physical examination of all persons to be engaged in all grades of service, specified herein.

Age Limits.

All new men employed in Train, Engine or Switching Service must be between Twenty-one and Forty-five years of age. No applicant under Twenty-one years of age will be accepted, excepting as Apprentices in shops and Messengers.

Physical Disabilities Which Bar Employment.

Train, Engine and Switching Service.

Loss of eye, leg, arm, more than two fingers, one thumb, great toe; hernia; fits or fainting spells of any character; syphilis, running sores; spinal affections; varicose veins, heart disease; tuberculosis in any form; and alcoholism.

Bridge and Building Service.

Loss of eye, arm, leg, great toe, more than two fingers; hernia; fits and fainting spells—syphilis, running sores; spinal affections, varicose veins; heart disease; tuberculosis in any form; and alcoholism.

Track, Car and Other Departments.

Loss of eye, arm, leg, more than two fingers; hernia; syphilis, running sores; spinal affections; fits, fainting spells; heart disease, alcoholism and tuberculosis in any form.

Dated at Kansas City, Mo., on 1st day of Nov., 1909.

188 Mr. T. J. Tige, G. Y. M.

DEAR SIR: I hereby apply for a situation during the pleasure of the above named Company as switchman or any other service or employment which may be necessary or required from time to time by the Company or my superior officers, and if accepted agree to observe all rules and regulations governing the service to which I may at any time be assigned, to pay my bills promptly each month; to maintain strict integrity of character; to abstain from the use of intoxicating liquors; to avoid saloons and places of low resort, or where liquors are sold; to perform all duties to the best of my ability, and any wages earned by and owing to me, shall not be due and payable until the regular pay day of the Company; and I agree to pay one dollar ($1.00) for the required physical examination providing I pass such examination, and further agree that said sum shall be deducted from my first earnings. I also understand that monthly deductions will be made from my salary for hospital dues.

I hereby agree, that any untrue or fraudulent statements made by me to the Medical Examiner, or any concealment of facts in this application, shall be considered just cause for dismissal from the service of the Company.

It is also understood and agreed by me that, if my references or work do not prove satisfactory, I am not to be retained. I was born at Martinsburg, W. Va., State of W. Va., on the 7th day of Oct. 1868. Height 5 feet 11 inches. Weight 162 pounds. Color
189 of eyes gray. Color of hair dark. Style of beard none. Name of my wife (if none so state) None. Residence City, St. and No. ——. Name of Father (if dead so state) None. Residence, City, St. and No. ——. Name of Mother (if dead so state) None. Residence City, St. and No. ——. Name of Children, 3. Residence, City St. and No. 209 N. Hardesty, Kansas City, Mo. Name of other near relatives (what relation?) Give Names, Residence-City, Street and No. —— Names and addresses of all persons to whose support I am contributing are as follows: Mrs. Dayton & son of 209 N. Hardesty street, Kansas City, State of Mo. Harry, Lucile, Gordyne Small, of 209 N. Hardesty Street, Kansas City, State of Mo. I have had 19 years' railroad experience on the following named roads: Missouri Pacific.

On what division, in what yard or at what station; Sedalia.

Between what dates, from Oct. 8, 1891, to Dec. 8, 1901; Dec. 8, 1901, to Sept. 22, 1909.

Name of superintendent, trainmaster, yard master or employer; M. Stillwell, J. E. Snediker, M. J. McKee, A. J. Alexander.

Name of railroad, Missouri Pacific.

Occupation, Br'k'man, Cond.

Names and residences of a railroad official and two other responsible persons who will vouch for my good character, any above.

Have you ever been in the employ of this Company? If so, when, where and in what capacity? Yes. Brakeman & Cond'r.

190 What was the cause of your leaving the service of this Company? Responsible for rear end collision.

Why did you leave the services of the Company you were last employed with? ——.

Can you see and hear perfectly? Yes. Can you readily distinguish colors? Yes.

(Applicant will here state whether or not he is in any way unsound or deformed in body or limb, or has lost any part of his limbs; if yes, describe same. State whether or not ever injured in any accident; and if yes, give date, location, name of road on which it occurred; nature and extent of injury, and whether entirely recovered; also whether settlement has ever been made, and the consideration for same. If sound in body and limb so state.)

Lees Summit, 18 yrs. ago. Sound in body & limb.

Have you ever had litigation with any Railroad Co.? No. If so, name of road. ——.

Have you ever applied to any guarantee or fidelity company for bond? No.

Was the application accepted? ——.

If rejected, when, where and why. ——.

Witnesses: M. J. Goddard.

Full name, Charles H. Small, Applicant. Residence, 209 N. Hardesty, Kans. City, Mo.

N. B.—Applicant must in all cases give the required information in his own handwriting, in the presence of and witnessed by the head of the department in which he is to be employed.

191 KANSAS CITY, 11/1, 1909.

Mr. M. J. Goddard, in the employ of The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Railway Co. as Y. M. C. has this day informed me of the duties connected with the employment I am about undertaking, viz: that of switchman, and has explained to me that the performance of said duties will expose me to great danger, the risk of which I assume for myself; and that I must use proper and constant care to avoid injury to myself and others. I have received a copy of the Time Table containing the printed Rules and Regulations of said Railway, with which I am to make myself familiar, and by them and such additions thereto as may be made from time to time, agree to be governed.

And I hereby acknowledge that I have been notified that there are numerous Bridges, Buildings, Tunnels, Viaducts, Stock Yard Chutes, Platforms and Coal Chutes and other obstructions now located and others may be constructed from time to time which will endanger my life and limb, and I agree in consideration of my employment to familiarize myself with same and use due care for my safety without further notice from the Railway Company, and I accept notice from said Railway Company that few, if any, of the aforesaid buildings or obstructions will clear a man riding on top or side of a car, and that I am to use constant care for my safety in working about same. I also understand and agree that when it is necessary for me to go into the yards of other companies, I
192 must exercise the same care about looking out for obstructions which may be close to track.

I certify, That I am correct and temperate in my habits; that, so

far as I am aware, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown on the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

Signature of Applicant, CHARLES H. SMALL.

Read over in my presence before signing:
Witness:
M. J. GODDARD.

Occupation, Y. M. C.

Surgeon's Certificate.

To be filled out and signed after a personal examination by any of the Company's Surgeons, at any of the following designated points: St. Louis, Jefferson City, Sedalia, Kansas City, Atchison, Concordia, Ft. Scott, Osawatomie, Council Grove, Hoisington, Pueblo, Wichita, Coffeyville, De Soto, Poplar Bluff, Little Rock, Texarkana, Mer Rouge, Wynne, Memphis, Alexandria, Van Buren, Charleston, Nevada, Mo., Chester, Ill., and Natchez, Miss.

The following is the report of the results of my examination of Mr. Chas. H. Small:

To be signed by applicant in presence of examiner.

1. When placed at a distance of twenty (20) feet from the test types, the last five (5) letters read correctly by the applicant are: Right eye, 20/20. Left eye, 20/20. Both eyes, 20/20.

193 2. A. The applicant selects skeins numbered as follows, as being of the same color as test skein A: Color.

B. The following as being of the same color as test skein B: Vision.

C. The following as being of the same color as test skein C: Normal.

3. The applicant hears the tick of a watch with the right ear at 15 inches; with the left ear at 15 inches. For ordinary conversation at a distance of twenty (20) feet, the hearing is 20/20 (expressed in fractions).

I find that there is evidence of recent successful vaccination; that he is not suffering from any disease or disability other than noted, and that he does not manifest any evidence of an abuse of intoxicating liquors.

I hereby certify that, having examined him for defects of vision, color perception and hearing, and for other physical defects, I find him qualified to fill the position of Swmn.

Disqualifying Defects, None. Defects that do not disqualify, None.

Remarks:.....

Examined by

J. A. WERNKE,
Surgeon at K. C., Mo.

Date of Examination, Nov. 1, 1909.

To be signed by surgeon making the examination.

Mr. White: I also offer that portion of the written application of the deceased, endorsed on the back of the application, dated "Kansas City, Mo., 11/1/1909.

Mr. M. J. Goddard, in employ of The Missouri Pacific
194 Railway Company St. Louis, Iron Mountain & Southern Railway Co. as Y. M. C., has this day informed me of the duties connected with the employment I am about undertaking, viz: that of switchman, and has explained to me that the performance of said duties will expose me to great danger, the risk of which I assume for myself; and that I must use proper and constant care to avoid injury to myself and others."

The defendant offers this clause of the contract as constituting a valid, subsisting contract between the defendant and the deceased, governing the relation of the parties as employer and employe, and relies upon the protection of this clause under Section 15, Article II of the Missouri Constitution, and the fact that to hold this clause of the contract invalid would impair the obligation of the contract entered into between the defendant and the deceased, and deprive the defendant of its property without due process of law.

Mr. Durham: We object first to the form of that offer, trying to inject in a technical way constitutional questions, anticipating the ruling of the court on the question of the admissibility of testimony.

We object to the admissibility or to the offer of the clause of the contract just read, for the reason that it contains portions which are void against public policy; it would be highly prejudicial to the plaintiff to admit same, particularly that portion which says, "the risk of which I assume for myself."

Mr. White: Counsel for defendant here states to the court that this clause is not offered as showing that the deceased waived the
195 benefit of any negligent act, but under the law the deceased could not waive the right to claim the benefit of any negligent act, and the law being that the defendant and its employes are presumed to act not in a negligent manner, and the contract not specifying that negligence is assumed but for the ordinary hazard and risks of the movement of cars in a railroad yard; that there is nothing in the clause offered that would in any way attempts to bind the deceased for the wrongful or negligent acts, but only the ordinary incidents of the movements of cars in the defendant's railroad yards, and that there is nothing contrary to public policy in the contract.

The Court: Do I understand you to be offering this second paragraph here which refers to and alludes to overhead construction?

Mr. White: No, sir; we do not offer that.

The Court: You are not offering that at all?

Mr. White: No, sir, just that first part of it in regard to the assumption of the ordinary risks.

The Court: If it only meant to assume the ordinary risks of employment I am inclined to think it might be admissible.

Mr. Cowherd: If it said that, it would mean nothing more than a statement of the law, it is not a part of the contract.

The Court: Well, the objection to its admission will be sustained.

To which action and ruling of the court defendant then and there at the time duly excepted.

196 Mr. White: Now I offer this part—this clause—the second part:

"I have received a copy of the Time Table containing the printed Rules and Regulations of said Railway, with which I am to make myself familiar, and by them and such additions thereto as may be made from time to time, agree to be governed."

Plaintiff's counsel made the same objection.

The Court: I will admit that.

Mr. Durham: No objection to that, and no objection to the other clause, if you will eliminate that part that we object to.

The Court: No objection to that part of it.

Mr. White: Well, I will offer this part too on the first page:

"I hereby apply for a situation during the pleasure of the above named company as switchman, or any other service or employment which may be necessary or required from time to time by the company or my superior officers, and if accepted agree to observe all rules and regulations governing the service to which I may at any time be assigned."

I offer that part too—any objection to that?

The Court: No, sir; no objection to that; that part of it can be read.

Defendant's counsel then read in evidence from said original application for employment, Exhibit 4, the following:

197 "I hereby apply for a situation during the pleasure of the above named company as switchman, or any other service or employment which may be necessary or required from time to time by the company or my superior officers, and if accepted agree to observe all rules and regulations governing the service to which I may at any time be assigned." * * *

"I have received a copy of the Time Table containing the printed Rules and Regulations of said Railway, with which I am to make myself familiar, and by them and such additions thereto as may be made from time to time, agree to be governed." * * *

Mr. White: I now offer Rule 391 A, effective November 1, 1901, identified by Mr Flagg.

Mr. Durham: We object to that, Your Honor, it refers to switching at both ends of tracks; that is not the situation here.

The Court: What is your objection to it?

Mr. Cowherd: The only objection is that it does not apply.

The Court: Part of it don't but I will overrule the objection; let it be read.

Defendant's counsel then read in evidence said Rule 391A, appearing on page 118 of the defendant's printed rules, effective November 1, 1901, as follows:

"391 (*a*). As it is frequently necessary to switch and shift cars at both ends of tracks in yards and elsewhere at the same time, Trainmen, Yardmen, Switchmen, Enginemen, and all other em-

198 ployes engaged in such work, or who may be affected by the same, are hereby notified and required before doing such shift-

ing or switching to protect themselves and their fellow-employes, by first ascertaining whether work of shifting is being done on or from the opposite end of the track, and if so, notify the crew or employes so at work of such shifting or switching, and to adopt such further measures as may be necessary to avoid accident. And all men at work at either end of, or on such track, must also at all times exercise due care to avoid injury from the movement of engines or cars upon, or from the end of such track opposite to the one on which they are so at work.

Cars and engines must not be moved on such tracks at an excessive rate of speed, and men working at either end of track must carefully watch the signals of men, and movement of cars and engines at the opposite end in order to protect themselves from danger."

O. P. JOHNSON, called as a witness on the part of defendant, being duly sworn, testified as follows:

Direct examination by Mr. White:

Q. Mr. Johnson, you were car inspector for the Missouri Pacific, you were one of the car inspectors for the defendant at the time of the fatal injury of Charlie Small?

A. Yes, sir.

Q. Did you inspect the knuckles of this car immediately after the—sixth and seventh car'—immediately after the body was found?

A. Yes, sir; I went down over it.

199 Q. Speak a little louder.

A. Yes, sir; I inspected the knuckles on these cars when I went over, when we got over.

Q. What was the condition of the knuckle?

A. Why, the knuckles worked in normal condition.

Q. Could you work the knuckles by using the lever?

A. You mean jerk them open?

Q. Yes.

A. Yes, sir; they were all right, except the Climax—the one on the coal car.

Q. That was on the seventh car?

A. Yes, sir; on the seventh car.

Q. What was the condition of that?

A. Well, it opened out probably two-thirds of the way open.

Q. Open two-thirds of the way open with the lever?

A. Yes, I should judge that it was, yes, sir; about that.

Cross-examination by Mr. Cowherd:

Q. The seventh car that you speak of, was counting the cars that were standing upon track No. 5, beginning at the easter-most car, and counting that one, that counted six, and then the seventh one was the one that had the Climax coupler?

A. Yes, sir.

Q. And that one the lever would not open up fully?

A. It did not only two-thirds open, yes.

Q. Yes, sir; so that a person had to take out and pull it open?

A. Well, not necessarily.
Q. Well, not necessarily, but probably.
A. Not if the other one were open.
Q. Didn't you say to Mr. White here that you boys inspected the knuckles?
A. Yes, sir.
200 Q. And found them all right except on the Climax car?
A. Yes, sir.
Q. And on the Climax car, you did not find it right, did you?
A. Well, it opened two-thirds, that is what I said.
Q. Well, is two-thirds all right?
A. They would couple, yes, sir.
Q. Oh, it will couple and sometimes won't you think?
A. Yes sir.
Q. That is what you mean is it?
A. Well no; I didn't mean it would not.
Q. What is that?
A. No, sir; I didn't say so.
Q. Then why don't you just say it was all right; was it all right?
A. It just—it didn't open wide open.
Q. No.
A. That is what I meant to say.
Q. Open wide open in order to make the couplings right along if it would not wide open it would be likely to miss the coupling under it?
A. I shouldn't say so.
Q. You don't know is that what you mean?
A. No, I don't know, I say they will couple two-thirds open.
Q. Well, what do you want them wide open for if they will couple only partly open, what difference does it make?
A. I say the lock permits the knuckle to go so far open.
Q. Well, that is not an answer to my question. If they make the couplings all right, what difference does it make whether they open wide open or only partly open, that is all you want it for is to make couplings, ain't it?
A. That is all, yes sir.
201 Q. Now, what difference does it make whether they open wide open or only partly open if they make the coupling?
A. Well, it should not make any, as long as the coupling is made.
Q. You know, as a matter of fact, this was out of order, don't you?
A. No, sir.
Q. Did you make any repairs upon it?
A. No, sir.
Q. Did you order any repairs upon it?
A. No, sir.
Q. Did you report it all?
A. Did I report what—the knuckle not coming open, no, sir.
Q. Where is your record of that inspection?
A. I have no record myself.
Q. You did make one, didn't you?

A. Yes, sir.
Q. How?
A. Yes, sir.
Q. I can't hear you.
The Court: Speak a little louder.
A. Yes, sir.
Q. And you made a record and set down just what you found, didn't you?
A. Yes, sir.

Mr. White: I will get it for you.
Mr. Cowherd: All right, get it.
Mr. White: Will you introduce it if I produce it?
Mr. Cowherd: Why didn't you produce it if you want it?
Mr. White: I will be glad to introduce it if you will let me do it.
Mr. Cowherd: Let me see your record and I will see about it, and I will examine your man.
202 Mr. White: I will introduce it and offer it now.
The Court: Is that all?
Mr. Cowherd: No, sir. I want to see this.

Q. Are you still in the employ of the Missouri Pacific?
A. No, sir.
Q. Who are you working for now?
A. Kansas City Southern.

(By Mr. White:)

Q. Working where?
A. Kansas City Southern.

(By Mr. Cowherd:)

Q. Not working for the Missouri Pacific?
A. No, sir.
Q. You made a record right there at the time you made this inspection, did you, have a book that you put it in?
A. Yes, sir.
Q. And always do, of your inspecting a car?
A. They have the inspection sheet in the office—the head inspector.
Q. Well, but you had a book right there that you put down your inspection in, didn't you?
A. I have not got the book.
Q. That is what I am asking you about; that is something that you made up after you went into the office?
A. Yes, sir; that is just the——

Mr. Cowherd: I want to see that book, if you have got it. That is all.

Redirect examination by Mr. White:

Q. This paper that I hand you, dated April 9, 1910, signed by yourself and Clymer, witnessed by Proffit and Wray, was the report that you made after examining that car, was it?

A. Yes, sir.

203 Mr. White: Any objection to this now?

Mr. Cowherd: Yes, sir; the witness has testified it was not the inspection notes that he had made at the time, but is a report that he made up after he went back to the office.

Mr. White: I offer that report as the report made by the witness to the defendant after making the objection.

Mr. Cowherd: I object to it as incompetent, self-serving and not the original notes of inspection—not the best evidence.

Mr. White: I offer it in pursuance of plaintiff's counsel's request for the report that he made, and produce it here as the report and the only report that was made.

Mr. Cowherd: I object to it for the reason that what I called for was the original notes that he made at the time, and this is not it.

The Court: Objection will be sustained.

To which action and ruling of the court, defendant then and there, at the time, duly excepted.

Said report of inspection, excluded by the court, is in words and figures as follows, to-wit:

204 Form 153 Revise. 11-07 5M PS.

The Missouri Pacific Railway Company.

Report of Inspection.

The St. Louis, Iron Mountain & Southern Railway Co. and Leased, Operated and Independent Lines.

April 9th, 1910.

Made by me on the 9th day of April 1910, at Kansas City, of O. C. Ry. coal car No. 2404 and D. & R. G. box car No. 62963, in the use of which C. H. Small was killed at Kansas City on the 9th day of April, 1910.

Draw Bars.—(Here insert kind of draw bars on each car, the height of same from top of rail to center of draft line, and if any defects, whether they are old or new, and what they are, if in bad order were they so marked and how and where.)

2504 O. C. Ry. coal car, automatic Climax coupler, a coal car, standard height and in good condition, Climax coupler B coal car standard height and in good condition.

62963 D. & R. G. box load, automatic spar on coupler A. & B. coal car, standard height and in good condition.

Brakes.—(Kind of brake, if broken, wheel or chain, state if old or new, how caused, did parts show a fresh break.)

2504 O. C. Ry. coal car hand and air brakes in good condition.

62963, D. & R. G. box car, air & hand brakes in good condition.

Ladders, grab irons, handholds and running boards.—(Here insert condition of same, and if defective, what defect is and
205 cause of same. Where the grab irons are located and height

of same from floor of car. Whether ladders are on sides or ends of cars and condition of same.

Grab iron and hand holds properly located & in good condition on 2504 O. C. Ry. coal car. 62963, D. & R. G. box car, grab irons, hand hold, side ladder & running boards in good condition.

Links and Pins.—(Were they of proper size, and were they bent, broken or slivered.)

2504 O. C. Ry. car. The co-pling levers in good condition.

62963, D. & R. G. The co-pling levers in good condition.

Pin pullers.—(Here state whether car was equipped with pin puller and condition of same.)

Were cars equipped with castings or buffers at either side of draw bars and did cars have any platforms?

2504 O. C. Ry. is equipped with cast buffers at side of couplers.

62693 D. & R. G. box car was equipped with buffers.

What repairs were made by you to cars? None required.

Remarks: Mr. C. H. Small was killed by all appearances by being catched between the above cars and after cars separated dropped down on track & 6 cars passed over him.

S. W. STOFFER,
Car Supt.

Occupation,

We, the undersigned, were present and helped make the above examination, and hereby certify that the facts as stated by S. W. Stoffer in above report are true.

AMOS CLYMER.
O. P. JOHNSON.
WALTER WRAY.
JOHN D. PROFFIT.

206 Instructions.—When persons are injured while coupling or uncoupling cars, or in any other way in which the accident may have been caused by defective appliances or machinery, the car or appliances must be immediately examined, to ascertain its condition, and report made of the inspection, giving the numbers and initials of cars examined, and the names of the persons making the inspection. This inspection must be made by the Inspector, Master Mechanic or Shop Foreman. When an accident is caused by the breaking of machinery, tools appliances or rails, the broken parts must be so marked as to be readily identified and immediately turned over to the Superintendent of the division or his assistant, who will forward same to the General Claim Agent.

This report must be made immediately after examination of cars, and sent to Master Mechanic, who will forward same by first train to General Claim Agent at St. Louis, Mo.

Stamped: "The Missouri Pacific Ry. Co. Office Superintendent, Apr. 26, 1910."

(By Mr. White:)

Q. You are working for the Kansas City Southern now?
A. Yes, sir.
Q. How long since you quit the Missouri Pacific?
A. I quit in last February.
Q. Do you know where Mr. Warren Kay is working now, what railroad he is working for?
A. Beg pardon?
Q. Warren Kay, do you know him?
A. Kay, yes, sir.
207 Q. Where is Mr. Kay now?
A. Why, I couldn't say where he is at present.
Q. He is a railroad man, is he?
A. Yes, sir; I seen him on the Belt Line.
Q. Switchman?
A. Yes, sir; it has been three months ago, probably.
Q. You saw him working three months ago for the Terminal?
A. Yes, sir.

Q. That is all.
Defendant here rested.
And the plaintiff here rested.

And this was all the evidence offered and introduced at the trial of said cause.

And thereupon at the close of all the evidence in the case, defendant asked the court to give an instruction in the nature of a demurrer to the evidence, which is in words and figures as follows, to-wit:

"The court instructs the jury that under the law and evidence in this case, your verdict must be for the defendant."
(Refused L.)

Which said instruction in the nature of a demurrer to the evidence the court refused; to which action and ruling of the court the defendant then and there at the time duly excepted and still excepts.

At this point court took a recess until 2 o'clock P. M.

208 Afternoon Session.

And thereupon, at the request of the plaintiff, and over the objections of the defendant, the court instructed the jury as follows, to-wit:

Plaintiff's Instructions Given.

1.

The court instructs the jury that if you find and believe from the evidence that Harry, Grace and Margaret Small are all the

minor children of Charles H. Small, deceased, and that at the time of his death he left no wife surviving him, and that plaintiff is the appointed curator of the estate of said children; and if you find from the evidence that said Charles H. Small was in the employ of defendant in its switching yards in Kansas City, Missouri, on or about 9th day of April, 1910, and while so employed was ordered by signal of the foreman under whom he was working to couple up the six cars attached to engine with cars on track No. 5, and was signaled by said foreman that said six cars would be "shoved in" on track No. 5, for the purpose of making such coupling; and if you find that said Charles H. Small did in obedience to said signal prepare to make such coupling and that it became necessary for him to go (and he did go) in upon defendant's said track No. 5 to adjust the coupling device of the cars already on said track on account of such device being out of working order (if you find it was out of working order), and if you find that it was the custom then and there when cars were signaled to be "shoved in" to keep them attached to and under the control
209 of the engine and not to let the cars to be coupled come together until signaled to do so by the switchman actually making the coupling and that said Small then and there relied upon said custom, and defendant's servants then and there failed and neglected to observe same, and without giving said Small any warning, negligently kicked or shunted the six cars down upon said track No. 5 and cut them loose from the engine so that they ran down uncontrolled upon said Small while he was on the track aforesaid (if you find he was) and thereby crushed his body and inflicted upon him injuries from which he died soon thereafter, then your verdict must be for the plaintiff, unless you further believe and find from the evidence that plaintiff was guilty of contributory negligence, or that he assumed the risk of being so injured, as defined by the other instructions.

(Given L.)

2.

Now by the word negligence as used in these instructions we mean the want of ordinary care, that is, such care as ordinarily prudent men would exercise under the same or similar circumstances.

(Given L.)

3.

The court instructs the jury that Charles H. Small in entering upon and continuing in the employment of the defendant Railway Company as a switchman assumed all the risks incident to the work he was called upon to perform, but he did not as-
210 sume the risks, if there were any such, arising from the negligence, if any, of the said Company, its servants and agents.

(Given L.)

4.

The jury are instructed that under the statutes of this state, if you find for the plaintiff, you will assess her damages, in your discretion, at not less than Two Thousand and not exceeding Ten Thousand Dollars.

(Given L.)

To the giving of which said instructions numbered 1, 2, 3 and 4, and each of them, as requested by plaintiff, defendant then and there at the time duly excepted and still excepts.

At the request of the defendant the court instructed the jury as follows, to-wit:

Defendant's Instructions Given.

1.

The court instructs the jury that the fact that the plaintiffs are employees and the defendant is a railroad company should not be considered by you in deciding the issues in this case and you should not take into consideration the supposed wealth of the defendant as compared to that of the plaintiff, but should weigh the evidence and consider the issues, the same as you would, if the controversy was between two individuals.

(Given L.)

211 2.

The court instructs the jury that the burden of the proof is on the plaintiff in this case to establish by a preponderance or greater weight of the testimony that the deceased met his death as a result of some negligence on the part of the defendant or its employees and unless you so find and believe from a preponderance or greater weight of the testimony, your verdict will be for the defendant.

(Given L.)

3.

The court instructs the jury that the defendant is not an insurer of its employees in its railroad yard, nor does it owe such employes a greater degree of care to protect them from being struck by moving cars in its railroad yard than such employees owe to themselves to prevent injury from coming in contact with such moving cars or engines. If you believe, therefore, from the evidence that after knowledge of the fact that the defendant's cars, by which he was caught, would be moved back upon the track, the deceased Charles Small stepped upon said track, with his back turned toward said moving cars, and failed to take any precautions to avoid injury from said cars, and as a result of such act on his part, he was struck by said cars and killed, then your verdict will be for the defendant.

(Given L.)

4.

The court instructs the jury that it is not necessary for you to believe from the evidence that the defendant was free from
212 negligence in order to find for the defendant, but notwithstanding, you may believe from the evidence that the injury and death of the deceased occurred as a result of the negligence of the defendant, combined with that of the deceased, your verdict should be for the defendant.

(Given L.)

5.

The court instructs the jury that if you believe from the evidence that the deceased had been notified that the empty cars being shoved in on track No. 5, were not to be used and that he need not couple said cars and that he was engaged in opening the couplers upon one of said cars in violation of the instructions of his foreman, at the time of his injury, then your verdict will be for the defendant.

(Given L.)

6.

The court instructs the jury that although you may believe from the evidence in this case that it was customary for the employees in the defendant's switch yard to be notified when they were coupling cars, that other cars were going to be shunted or kicked against said cars, yet, if you further believe from the evidence that the deceased had been notified to let the empty cars on track No. 5 go, then he would not have had the right to act upon such custom and your verdict will be for the defendant in this case.

(Given L.)

213 Defendant also asked the court to instruct the jury as follows:

Defendant's Refused Instructions.

7.

The court instructs the jury that if you find for the plaintiff, you will assess the damages at any sum, not exceeding the sum of $10,000.00.

(Refused L.)

8.

The court instructs the jury that if you find and believe from the evidence in this case that before entering into the employment of the defendant, the deceased entered into a written contract, by which he undertook and agreed, in consideration of his employment, to look out for his own safety, in and about the railroad yards

of the defendant, then this constituted a valid and subsisting contract between the deceased and the defendant, which could not be impaired and to permit a recovery in the face of such contract would deny the defendant the benefit of the constitution of Missouri, Section 15, Article 2, and impair the obligation of the defendant's contract.

(Refused L.)

9.

The court instructs the jury that if you believe from the evidence in this case that the deceased Charles Small, at the time of his injury, was attempting to open the knuckles of a freight car on the defendant's track, in its East Bottoms yard, by standing with his body against the draw bar of said car, after knowledge
214 on his part that other cars would be moved down against the car aforesaid, and that it would have been safer for him to attempt to open the knuckles of said car by standing at the side of the draw bar instead of against it and that he voluntarily selected the more dangerous way of performing said duty, then your verdict will be for the defendant.

(Refused L.)

10.

The court instructs the jury that although you may believe from the evidence in this case that it was customary to give notice before kicking cars against cars that switchmen were engaged in coupling, yet, if you further believe from the evidence in this case that before the deceased stepped upon the track, he had notice by signal or otherwise that cars would be shoved in on that track, then your verdict must be for the defendant, although you may believe from the evidence that the cars were shunted or kicked in instead of shoved along, unless you believe from the evidence that the deceased was not in a position to see the movement of said cars and to avoid being struck thereby.

(Refused L.)

11.

The court instructs the jury that there is no duty upon a railway company, moving its cars in its private railroad yard, to give notice or warning to any switchman, who may be upon or about the tracks, in such railroad yard, before the cars are moved
215 or shunted together and you cannot base a verdict in this case upon the failure on the part of the defendant or its employees to give warning or notice to the deceased, that the six cars by which he was struck, were going to be shunted against the east car of the two cars, where his body was found.

(Refused L.)

12.

The court instructs the jury that there is no proof in this case that the employees of the defendant, in charge of the engine and string of cars, by which the deceased Charles Small was struck, were guilty of any negligence in not having discovered the said Charles Small upon the railroad track in a position of peril in time, by the exercise of ordinary care, to have avoided injuring him.

(Refused L.)

13.

The court instructs the jury that the defendant was not bound to assume that any employee, familiar with the manner of transacting business in its railroad yard would place himself upon the track in front of cars that he knew or ought to have known were approaching, with his back in the direction of said cars, and unless you find and believe from the evidence that the defendant's employees did know of the dangerous position of the deceased in time to have avoided striking him, by the exercise of reasonable care, after
216 he was seen in a position of peril, then your verdict must be for the defendant.

(Refused L.)

Which said instructions numbered 7, 8, 9, 10, 11, 12 and 13, requested by defendant, the court refused to give; to which action and ruling of the court in refusing to give said instructions numbered 7, 8, 9, 10, 11, 12 and 13, and each of the same, as requested by defendant, defendant then and there at the time duly excepted and still excepts.

And the court of its own motion instructed the jury as follows, to-wit:

Instructions by the Court of its Own Motion.

X.

The court instructs the jury that it is not necessary that all of the jurors should concur or agree upon the verdict to be rendered herein, but if nine or more, but less than twelve members of the jury, agree upon a verdict, then the jurors so agreeing may sign the verdict so agreed upon and return the same as their verdict in this case. If all the jurors agree upon the verdict then only your foreman is required to sign the verdict.

Y.

The court instructs the jury that if you find for the plaintiff, your verdict will be in the following form:

"We, the jury, find for the plaintiff and assess her damages at the sum of —— dollars."

217 If you find for the defendant your verdict will be as follows:

"We, the jury, find the issues for the defendant."

These forms are given for your guidance only, and your verdict must be written on a separate paper.

To the giving of which instructions numbered X and Y, and each of them, by the court of its own motion, defendant then and there at the time duly excepted and still excepts.

And afterwards, to-wit, on Tuesday, the 19th day of March, 1912, under the pleadings and the evidence introduced, the instructions given as aforesaid, and the arguments of counsel for the respective parties, the jury retired to its room and after due deliberation returned into court the following verdict, to-wit:

Verdict.

Mar. 19, '12.

We, the jury, find for the plaintiff and assess her damages at the sum of $8,000.

MR. AUG. LANDWEHRKAMP, *Foreman.*
WILLIAM RAFINER.
FRANK W. TURNER.
J. H. MENN.
JAS. L. GODSOE.
P. N. TALLEY.
R. R. MAUPIN.
GUY HOLZCLAW.
LOYD W. SWEARINGEN.
J. H. SULLIVAN.

And judgment was rendered accordingly.

218 And afterwards, to-wit, on Friday, March 22, 1912, the same being the 11th day of the March Term, 1912, of said court, and within four days after the rendition of said verdict, defendant herein filed its motion for a new trial of this cause, which is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, 1912.

No. 53537.

MARGARET L. TABER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Motion for a New Trial.

Defendant moves the court to set aside the verdict of the jury and to grant the defendant a new trial, for the following reasons:

I.

The court erred in overruling the defendant's objection to the introduction of any testimony, under the allegations of the plaintiff's petition, made at the commencement of the trial.

II.

Because the court erred in admitting incompetent and illegal evidence on the part of the plaintiff during the trial.

III.

Because the court erred in excluding legal and competent evidence offered by the defendant at the trial.

IV.

Because the court erred in refusing the defendant a continuance on the close of the plaintiff's evidence, after the plaintiff was
219 permitted to amend the petition by interlineation, in changing the representative capacity of the plaintiff in the prosecution of the action from that of guardian of the persons of the minor plaintiffs to that of curator of their estates, upon the showing of surprise caused by this variance between the pleadings and proof.

V.

The court erred in permitting the amendment of the petition at the close of the plaintiff's case, by interlineation, in substituting the curator of the minor plaintiffs' estate for the guardian of their estate, after the issue squarely made upon the alleged representative capacity of the plaintiff to sue as guardian and the failure to establish the plaintiff's capacity to sue in such representative capacity.

VI.

The court erred in overruling the demurrer asked at the close of the plaintiff's evidence.

VII.

The court erred in giving each and every one of the four instructions given on behalf of the plaintiff.

VIII.

Because the court erred in refusing each and every one of the seven refused instructions asked by the defendant.

IX.

Because the verdict is against the evidence and against the weight of the evidence.

220 X.

Because the verdict is contrary to the law and contrary to the instructions of the court.

XI.

Because there is no evidence to support the verdict but it was contrary to the evidence and contrary to the law.

XII.

Because the court erred in overruling the demurrer asked at the close of the entire case.

XIII.

Because the verdict is the result of sympathy and passion and prejudice.

XIV.

Because in excluding the written contract and application of the deceased, by the terms of which, he assumed and agreed to waive any action for damages for any injury resulting from the ordinary hazards of the defendant's railroad yards, as a result of being struck by moving cars or engines in said yard, the court deprived the defendant of said written contract and impaired the obligation of said contract, in violation of Section 15, Article 2, of the Constitution of Missouri, and deprived the defendant of its property, without due process of law, and denied the defendant the equal protection and benefit of the law, in violation of the 14th Amendment to the Constitution of the United States.

XV.

Because the verdict is grossly excessive in amount.

221 Wherefore, defendant asks the court to set aside the verdict and to grant the defendant a new trial.

WHITE & LYONS,
Attorneys for Defendant.

Endorsed: "Filed Div. 2, Mar. 22, 1912, James B. Shoemaker, Clerk, by Thomas W. McGuire, D. C."

And afterwards, on the same day, to-wit, on the 22nd day of March, 1912, the same being the 11th day of the March Term, 1912,

of said court, and within four days after the rendition of said verdict and judgment, defendant herein also filed its motion in arrest of judgment, which is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, 1912.

No. 53537.

MARGARET L. TABER, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Motion in Arrest of Judgment.

Defendant moves the court to arrest the judgment in this case, for the following reasons:

I.

Because the petition fails to allege facts sufficient to constitute a cause of action.

II.

Because upon the whole record, the judgment and verdict is for the wrong party.

III.

Because the verdict and judgment are irregular and void.

222 Wherefore, defendant moves the court to arrest the judgment.

WHITE & LYONS,
Attorneys for Defendant.

Endorsed: "Filed Div. 2, Mar. 22, 1912. James B. Shoemaker, Clerk, by Thomas W. McGuire, D. C."

And afterwards, to-wit, on Saturday, May 18, 1912, the same being the 6th day of the May Term, 1912, of said court, come the parties hereto by attorneys, and defendant's motion for a new trial of this cause was by the court taken up, fully heard and considered, and was by the court overruled; to which action and ruling of the court defendant then and there at the time duly excepted.

And afterwards, on the same day, to-wit, on Saturday, May 18, 1912, the same being the 6th day of the May Term, 1912, of said court, come the parties hereto by attorneys, and defendant's motion

in arrest of judgment of this cause was by the court taken up, fully heard and considered and was by the court overruled; to which action and ruling of the court defendant then and there at the time duly excepted.

And afterwards, to-wit, on Wednesday, May 22, 1912, the same being the 9th day of the May Term, 1912, of said court, defendant filed its application and affidavit for an appeal from the judgment and decision of this court; and the court grants to the defendant an appeal to the Supreme Court of the State of Missouri; and
223 allows the defendant until on or before the 2nd day of September, 1912, in which to present and file its Bill of Exceptions herein; and the court upon the application of the defendants fixes the amount of the appeal bond to be filed herein at the sum of Seventeen Thousand Dollars ($17,000).

Defendant thereupon filed its appeal bond in the sum of Seventeen Thousand Dollars ($17,000) with the Missouri Pacific Railway Company as principal and J. W. Perry and H. T. Abernathy as surety thereon; and the aforesaid appeal bond was by the court approved.

Said affidavit and bond for appeal, filed by defendant on May 22, 1912, as aforesaid, is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, State of Missouri.

MARGARET L. TABER, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Martin Lyons, attorney and agent for The Missouri Pacific Railway Company, appellant, state- that the appeal in the above entitled cause is not made for vexation or delay, but because this affiant believes that the said appellant is aggrieved by the judgment and decision of the above named court in said cause.

MARTIN LYONS.

Subscribed and sworn to before me this 20th day of May, 1912.

[SEAL.] JAMES B. SHOEMAKER, *Clerk*.
By D. M. McCLANAHAN, *D. C.*

224 And know all men by these presents; that we, The Missouri Pacific Railway Company, as principal, and J. W. Perry and H. T. Abernathy as sureties, are held and firmly bound unto Margaret L. Taber in the sum of Seventeen Thousand Dollars ($17,000), for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated at Kansas City, Mo., this 20th day of May, A. D. 1912.

The condition of the above obligation is such that whereas, The Missouri Pacific Railway Company has appealed from the judgment rendered against it in favor of Margaret L. Taber in the Circuit Court

of Jackson County, Missouri, for the sum of Eight Thousand Dollars ($8,000) and no cents, together with costs.

Now, if said appellant shall prosecute said appeal with due diligence, to a decision in the Supreme Court of Missouri, or any appellate court, and shall perform such judgment as shall be given by the Supreme Court of Missouri or any appellate court, or such as the Supreme Court of Missouri or any appellate court may direct the Circuit Court of Jackson County, Missouri, to give, and, if the judgment, or any part thereof, be affirmed, will comply with and perform the same, so far as it may be affirmed, and pay all damages and costs which may be awarded against it by the Supreme Court of Missouri, or any appellate court, then this obligation is to be
225 void, otherwise to remain in full force and effect.

[CORPORATE SEAL.]

THE MISSOURI PACIFIC RAILWAY COMPANY,
By MARTIN L. CLARDY,
Vice-President.

J. W. PERRY. [SEAL.]
H. T. ABERNATHY. [SEAL.]

Attest:
F. W. IRELAND,
Secretary of said Corporation.

O. K.
COWHERD, INGRAHAM,
DURHAM & MORSE,
By D.

Endorsements: "No. 53537. Margaret L. Taber, Plaintiff, v. The Missouri Pacific Railway Company, Defendant. Affidavit and bond for appeal. Filed Div. 2, May 22, 1912. James B. Shoemaker, Clerk."

And afterwards, to-wit, on Wednesday, June 26, 1912, the same being the 38th day of the May Term, 1912, of said court, comes the defendant by attorney, and for good cause shown by the defendant the time heretofore given defendant in which to present and file its Bill of Exceptions in this cause is hereby extended until on or before the 4th day of November, 1912.

And afterwards, to-wit, on Wednesday, October 30, 1912, the same being the 40th day of September Term 1912, of said court, for good cause shown by defendant the time heretofore given defendant in which to present and file its Bill of Exceptions herein was by the court extended until on or before the 2d day of December, 1912.

226 And now comes the defendant, The Missouri Pacific Railway Company and presents the foregoing to the Hon. O. A. Lucas, Judge of the Circuit Court of Jackson County, Missouri, and prays him to allow and sign the same as its true Bill of Exceptions to the acts and rulings of the court hereinbefore recited.

Now, therefore, the undersigned, Judge of the Circuit Court, before whom said cause was pending and said proceedings were had, being fully advised in the premises, doth find the foregoing to be a true Bill of Exceptions on behalf of said defendant, The Missouri Pacific Railway Company, and doth sign and in open court doth order that the same be filed and be made a part of the record in said cause.

Given under my hand at Kansas City, Missouri, this 18th day of November, 1912.

O. A. LUCAS,
Judge of Division No. 2 of the Circuit Court of Jackson County, Missouri.

Approved:
COWHERD, INGRAHAM,
DURHAM & MORSE,
Attorneys for Plaintiff.

Filed Div. 2. Nov. 18, 1912. James B. Shoemaker, Clerk, by Thomas W. McGuire, D. C.

227 In the Supreme Court of Missouri.

And thereafter, to-wit, on April 20th, 1915, the following further proceedings were had and entered of record in said cause:

"17320.

M. L. TABER, Guard., etc., Resp.,
vs.
MISSOURI PACIFIC RY. CO., App.

Come now the said parties, by attorneys, and after arguments herein, submit this cause to the Court, with leave of five days to appellant to file a reply brief herein, and five days thereafter to respondent to file reply thereto."

And thereafter, to-wit, on February 29th, 1916, the following further proceedings were had and entered of record in said cause:

"17320.

M. L. TABER, Guard., etc., Resp.,
vs.
MISSOURI PACIFIC RY. CO., App.

Now at this day, a majority of the Court not concurring in the

opinion herein, it is ordered by the Court that said cause be, and the same is hereby transferred to the Court in Banc."

228 In the Supreme Court of Missouri. Court in Banc.

And thereafter, to-wit, on May 3rd, 1916, the following further proceedings were had and entered of record in said cause:

"17320.

M. L. TABER, Guard., etc., Resp.,
vs.
MISSOURI PACIFIC RY. CO., App.

Come now the said parties, by attorneys, and after arguments herein, submit this cause to the Court."

And thereafter, to-wit, on May 15th, 1916, the following further proceedings were had and entered of record in said cause:

"17320.

MARGARET L. TABER, Guardian, Respondent,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellant, her costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows:

229 In the Supreme Court of Missouri, Division No. 1, October Term, 1915.

No. 17320.

MARGARET L. TABER, Guardian, Respondent,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court for Jackson County.

Petition filed September 21, 1910, in said court stating that the respondent is guardian of Harry H. Small, Grace L. Small and Mar-

garet G. Small, minor children of Charles H. Small, deceased, and setting forth her appointment as such guardian by the probate court for Jackson County. It states that Charles H. Small was employed by the defendant as a switchman in the East Bottoms switch yards of defendant, in Kansas City, Missouri, where it was his duty as such switchman to aid in cutting up and making up trains and switching and coupling cars under the supervision of a switch foreman.

That about 8:45 o'clock A. M. on April 19, 1910, while he was engaged in switching cars on track number five in said yard, by taking out loaded cars and returning empty ones to the said track, and two of the empties which had been so returned were running slowly by gravity down said track, which was slightly inclined toward the west, the foreman directed him by signal to prepare to couple them up with six other empty cars being brought back by the engine to said track, the foreman also signalled him that the six cars would be "shoved in" on said track five for coupling, that is to say: they would be brought in attached to and under control
230 of said engine, and not cut loose and permitted to run by gravity.

That said Small, as his duty was upon said signal, "immediately proceeded to prepare to make the coupling with said two cars which were still moving along as aforesaid; that the drawhead, or coupling device of the east or rear car being the one to which the coupling was to be made, was out of repair and not in working order so that it was necessary for the said Charles H. Small in obedience to said foreman, and in line of his duty as said switchman, to walk (and he did walk) along on the said track following just behind said car as it moved along for the purpose of adjusting said coupling device in order to make said coupling. * * *

"That while said Chas. H. Small was so endeavoring to adjust said coupling device, the defendant negligently and carelessly detached, or caused to be detached, the said six cars from the engine aforesaid and shunted them in on said track 5 and negligently and carelessly allowed and permitted said six cars to run down said track without any warning to said Chas. H. Small and contrary to the signal information theretofore given him by said foreman. That said Chas. H. Small had no knowledge of the approach of said cars from his rear while he, with his back turned, was endeavoring to adjust the coupling device as aforesaid. That said six cars by reason of the negligence and carelessness as aforesaid of defendant were left to gravitate down upon the said Charles H. Small while he was in the position aforesaid and crushed him against the said draw head cars which he was following and thereby killed him almost instantly. That it was the duty of defendant, its officers, agents and employees to warn said Charles H. Small of the approach of said six cars in the manner aforesaid. That it was the custom in coupling cars that were 'shoved in' to keep them attached to and under the control of the switch engine as aforesaid and not to make the coupling until signalled by the switchman actually making same that he was ready and in the clear."

231 It then proceeds to state that Small relied upon said custom

and manner of doing the work and that the negligence and carelessness of the defendant in disregarding it and failing to warn him resulted in his death. That he was a widower about forty-two years of age; that his wife died on or about May tenth 1909; and that he left surviving him the minor children above named, and concluded as follows:

"Wherefore plaintiff says a cause of action has accrued to plaintiff as guardian of said minor children, and that the amount which plaintiff is entitled to recover is $10,000.

"Wherefore plaintiff prays judgment against defendant for ten thousand ($10,000) Dollars and costs."

The defendant demurred generally, and after the overruling of the demurrer filed its amended answer, (1) denying "that Margaret L. Taber is the duly appointed guardian for Harry H., Grace L. and Margaret G. Small, as alleged in the petition;" (2) alleging generally that Small's death "was due to his own carelessness and negligence directly contributing thereto and for which the defendant was in no way responsible;" and (4) that the death of Small was due to a risk incident to his employment and assumed by him by written contract to that effect.

The plaintiff replied by general denial.

The evidence tended to show, and, so far as the physical situation goes, is undisputed, that the place where the accident happened that resulted in the death of Mr. Small was a train yard of the defendant railway company consisting of nineteen parallel tracks running west from the lead which communicated with them, and numbered consecutively from south to north. Track number five was laid on a very slightly descending grade from east to west, so that cars shoved upon it and released would continue to move by gravity.

252 At about eight o'clock on the morning of the accident train number fifty-three was to be made up for the West on track nine, and among other tonnage was to take fourteen loaded cars from a coupled string of forty-two mingled loads and empties which stood on track five. A switch engine, with the crew to which the deceased belonged, consisting of the engineer and fireman, one switchman who followed the engine and released cars, the deceased, called the long field man, whose duty it was to attend to the switches and other work farthest removed from the engine, and another switchman for the short field, together with the foreman, was assigned to this work. To perform it, it was necessary for the engine to go onto number five track, couple to a drag of twenty-five cars from the forty-two which stood there, pull it out onto the lead, then shove it into number nine track, which was one hundred fifty feet north of number five in a direct line and two hundred twenty feet along the lead, where they left all the loads in the rear coupled to number fifty-three. They then pulled the remainder of the drag clear of number five switch, and put three empty cars, which came next on that track where they continued to run slowly down the track. The drag then pulled out and again went in on number nine track, coupling to number fifty-three all loads behind the next two empties, which were pulled out and started down track five. They

then went back to track nine, and left the remaining loads coupled to fifty-three, leaving six empties attached to the engine. These they pulled out of track nine and up the lead to clear the switch to track five, where it stopped, standing ready to push its cars onto track five to be coupled to the two that were then moving slowly down that track after the first three that had been thrown in. The lead was clear to a point beyond track nine. Mr. Kay, the switchman who told this story to the jury, stood just outside the switch to track five, ready to throw the empties in. Mr. Lonegan, the foreman, stood about ten feet away on the inside of the lead, while the deceased was right on track nine where he had been coupling
233 the loads, the three men being within plain sight of each other, when the movement began which resulted in the death of Mr. Small. Mr. Lonegan then signalled Mr. Small that he was going to shove in on track number five, and to couple up. The latter walked straight across to number five track, one hundred and fifty feet, stepped behind the two cars last released and still moving slowly down the track, and finding the coupler out of order so that the jaws would not open, walked behind it trying to open them. While he was doing this, the engine shoved its six cars two or three car lengths in on track five, gave them a kick, that is to say, increased the speed of the engine and released them, and they went down the track at a speed of ten or twelve miles per hour. It was, the evidence tended to show a rule or custom in the performance of such work that when cars were shoved into a track attached to the engine, for the purpose of being coupled to other cars, to stop the engine before coming in actual contact with the coupling, and wait for a signal from the switchman making the coupling, to proceed. Mr. Lonegan, the foreman of the crew, was a witness for defendant and told the story of these movements in his testimony. He denied that he had given Mr. Small any signal whatever directing him to go across to track five, or to couple the cars to be placed on that track; but that, on the contrary he had, before the movement began, directed him in the following words: "Charlie, anything that we throw that are held back on No. 5, let them go to hell." He also stated that he never saw Mr. Small alive after he saw him standing on track nine, and that had he *seen* him in on track five to do the coupling he would have waited for a signal before pushing in the cars.

Should it be necessary to make further reference to the testimony we will do so in the course of the opinion. At the close of the plaintiff's evidence the defendant asked a peremptory in-
234 struction for a verdict which was refused.

At the close of all the evidence the court, at the request of plaintiff, gave the jury, among others, the following instructions of which the defendant complains.

"1. The court instructs the jury that if you find and believe from the evidence that Harry, Grace and Margaret Small are all the minor children of Charles H. Small, deceased, and that at the time of his death he left no wife surviving him, and that plaintiff is the appointed curator of the estate of said children; and if you find from the evidence that said Charles H. Small was in the employ of de-

fendant in its switching yards in Kansas City, Missouri, on or about 9th day of April, 1910, and while so employed was ordered by signal of the foreman under whom he was working to couple up the six cars attached to engine with cars on track No. 5, and was signaled by said foreman that said six cars would be 'shoved in' on track No. 5, for the purpose of making such coupling; and if you find that said Charles H. Small did, in obedience to said signal prepare to make such coupling and that it became necessary for him to go (and he did go) in upon defendant's said track No. 5 to adjust the coupling device of the cars already on said track on account of such device being out of working order (if you find it was out of working order), and if you find that it was the custom then and there when cars were signaled to be 'shoved in' to keep them attached to and under the control of the engine and not to let the cars to be coupled come together until signaled to do so by the switchman actually making the coupling and that said Small then and there relied upon said custom, and defendant's servants then and there failed and neglected to observe same, and without giving said Small any warning, negligently kicked or shunted the six cars down upon said track No. 5 and cut them loose from the engine so that they ran down uncontrolled upon said Small while he was on the track
235 aforesaid (if you find he was) and thereby crushed his body and inflicted upon him injuries from which he died soon thereafter, then your verdict must be for the plaintiff, unless you further believe and find from the evidence that plaintiff was guilty of contributory negligence, or that he assumed the risk of being so injured, as defined by the other instructions."

"4. The jury are instructed that under the statutes of this state, if you find for the plaintiff, you will assess her damages, in your discretion, at not less than Two Thousand and not exceeding Ten Thousand Dollars."

Among others given at the request of defendant was the following:

"4. The court instructs the jury that it is not necessary for you to believe from the evidence that the defendant was free from negligence in order to find for the defendant, but notwithstanding, you may believe from the evidence that the injury and death of the deceased occurred as a result of the negligence of the defendant, combined with that of the deceased, your verdict should be for the defendant."

It refused to instruct the jury at defendant's request as follows:

"9. The court instructs the jury that if you believe from the evidence in this case that the deceased Charles Small, at the time of his injury, was attempting to open the knuckles of a freight car on the defendant's track, in its East Bottoms yard, by standing with his body against the draw bar of said car, after knowledge on his part that other cars would be moved down against the car aforesaid, and that it would have been safer for him to attempt to open the knuckles of said car by standing at the side of the draw bar instead of against it and that he voluntarily selected the more dangerous way of performing said duty, then your verdict will be for the defendant.

236 "10. The court instructs the jury that although you may believe from the evidence in this case that it was customary to give notice before kicking cars against cars that switchmen were engaged in coupling, yet, if you further believe from the evidence in this case that before the deceased stepped upon the track, he had notice by signal or otherwise that cars would be shoved in on that track, then your verdict must be for the defendant, although you may believe from the evidence that the cars were shunted or kicked in instead of shoved along, unless you believe from the evidence that the deceased was not in a position to see the movement of said cars and to avoid being struck thereby."

The jury returned a verdict for plaintiff for $8,000.00, from which the defendant has taken this appeal.

1. This cause was argued and submitted here on April 20, 1915. In the oral argument the appellant contended for the first time that the facts "clearly show that the deceased was engaged in handling cars engaged in interstate commerce at the time of his death," and that for that reason the judgment should be reversed upon this appeal. It afterward filed by leave of court a "reply brief" in which the same point was urged and, by the court's permission it was answered by respondent. The first question, therefore, is whether this point is now before us.

The petition clearly states a cause of action founded upon the provisions of section 5425 of the Revised Statutes of Missouri, 1909, and asks the penalty therein imposed. We find nothing in it that gives color to appellant's contention that the pleader attempted to state a cause of action under the next succeeding section. Although it mentions the defective condition of the coupling device at which the injury occurred, it is only as a matter of inducement, and alleges no negligence with respect to it.

The federal statute which the appellant now invokes is section 8657 of the Compiled Statutes of 1913.

237 So far as it is applicable to this case it is as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

No reason has been suggested why this petition does not state all the facts necessary to a recovery by these children under the Missouri statute cited. That it does not state a cause of action in favor of the personal representative of the deceased under the federal statute is clear, for there is no statement of the vital fact that the injury was inflicted while the defendant was engaging in commerce between the states and territories, and while the deceased was employed by it in such commerce. The state court having jurisdiction to entertain the action under both statutes, its proceedings must be judged by its

own practice which requires an answer which shall contain a statement of any new matter constituting a defense (R. S. sec. 1806). It follows from the statement in the petition of all the facts necessary to constitute a perfect cause of action under the state statute, that if it is sought to defeat it, by showing the additional facts that the injury was inflicted while the defendant was engaging in interstate commerce, and while the deceased was employed by it in such commerce, those facts should have been pleaded in the answer. This was the first step provided by the Missouri code for presenting such matters for the determination of the court.

At the trial it was stated in evidence that one of the objects of the work in which deceased was engaged was the making up of a
238 train to go west to some destination not named and by some of the several lines of the defendant's railroad that cross the western frontier of the state at various distances from Kansas City, and that certain cars bore initials, the meaning of which is not stated, but of which counsel for defendant asks us to take judicial notice. If this testimony tended to prove that the appellant and deceased were engaged in interstate commerce at the time of the injury, there was still an opportunity under the Missouri code for the defendant to conform his answer to such evidence and to have the question submitted to the jury. Instead of doing this he asked and the court granted its submission upon the theory, inconsistent with the terms of the federal statute, that contributory negligence on the part of the deceased constituted a complete defense to the action. To raise the question upon appeal the statute expressly requires (R. S. 1909, sec. 2081) that it should appear in the record that it was submitted to the determination of the trial court, and was expressly decided against the appellant. There is nothing in the record indicating this. On the contrary, the appellant, after having availed himself of the defense of contributory negligence under the state statute and lost, is now seeking to recede because, for the purpose of gaining this advantage, to which it was not entitled, it had concealed its real defense. The Employers' Liability Act bears none of the marks of having been enacted for such a purpose. Having digged this pit, it is appropriate that the appellant should have been the one to fall into it. The question of the application of the Employers' Liability Act not having been decided by the trial court, no exception with respect to it can be taken here.

2. The appellant contends that the plaintiff has no legal capacity to sue as the guardian of the minors for the fund accruing to them on account of the death of their father, the cause of action being in the minors alone and cites Judson vs. Walker, 155 Mo., 166 and Webb vs. Hayden, 166 Mo., 39 in support of this contention.
239 It fails, however, to cite the recent case of Gibson vs. Shull, 251 Mo., 480, in which Graves, J., speaking for this court in Division Number one in a similar case said: "It is also true that the action should be in the name of the ward, rather than that of the curator," because the learned Judge immediately proceeded to say "if there was a defect in the petition in this regard it was one which was patent upon the face thereof, and such question is waived unless

there is a special plea thereto." In the case now before us the appellant has not been content to waive the alleged defect in pleading by his silence, but has expressly recognized the guardian as the proper party to the action by a special plea in its answer as follows: "Defendant, for its amended answer to the petition of the plaintiff, denies that Margaret L. Taber is the duly appointed guardian for Harry H., Grace L. and Margaret G. Small, as alleged in the petition."

While the case just cited effectually disposes of the point, we feel impelled in view of the authorities referred to by the appellant to give a word to provisions of our own code of civil procedure which seem relevant to this question.

That the curator is entitled to the actual possession of the fund in controversy to the exclusion of all others there can be no doubt; and that in this respect he is trustee of an express statutory trust necessarily follows. That such trusts are within the provisions of section 1730 of the Revised Statutes of 1909 authorizing the trustee of an express trust to sue in his own name is a settled doctrine of this court. (Jones vs. Railway, 178 Mo., 528, 541; Lee vs. Railway, 195 Mo., 400, 419.) The utility of this section is evident from the fact that the presence of the curator, or of some one with similar authority, is necessary to make a suit for the recovery of money available to the end for which it is brought. The trustee, suing under this section, is at liberty to join with himself in the suit all the parties in interest
240 under the provisions of the next succeeding section. We see nothing in any reasonable construction of section 1739 of the same revision, authorizing suits by infants to be commenced and prosecuted by their curators; that modifies the statutory authority to which we have already referred. We see no reason why the curator was not at liberty under express authority of the code, to frame his petition in either of the three forms we have suggested, that is to say: (1) in his own name as curator; (2) joining himself and his wards as plaintiffs; and, (3) in the name of his wards by himself as curator.

3. The first instruction given for the plaintiff substantially authorizes a recovery if at the time of the accident the deceased had been ordered by his foreman to couple the six cars then attached to the engine with the cars already on track number 5; that the foreman notified him that the six cars would be "shoved in" for that purpose; that it was the custom in doing such work under such an order to keep the cars attached to the engine and not permit them to strike the car to which they were to be coupled until signalled by the switchman making the coupling to do so; that relying upon the same, the deceased went upon the track to make a necessary adjustment of the coupling device of the car to which the coupling was to be made, and while he was there the employees in charge of the engine negligently kicked or shunted the six cars against the car upon which deceased was working thereby crushing and killing him; unless the plaintiff was guilty of negligence contributing to the injury.

This instruction properly made the plaintiff's right to recover

turn upon the question whether or not it was negligent in the employees controlling the movements of the engine and six cars, to drive those cars against the one at which deceased was working without any direction from him, contrary to the customary method of doing the work, which required them to wait for such direction. It amply appears from the evidence that the coupling apparatus was frequently in condition to require adjustment so that the
241 jaws would open and couple automatically by the impact of the car, and if it was reasonably to be expected that in the performance of this duty the deceased would place himself in the position in which he was killed, a corresponding duty rested upon defendant to avoid injuring him in that position. We can imagine no more effective way of securing this protection than by the practice mentioned in the pleadings and evidence, of waiting for a signal from the switchman charged with the coupling before bringing the cars together. In this instance following that practice would have saved the life of the deceased. It not only insures the safety of the place in which he is required to perform these duties, but enables him to do his master's work with promptness and accuracy, and undistracted and unhind-red by the necessity of constant watchfulness in a direction opposite to that in which it lies. Each had his own duties to perform in furtherance of the common object; the deceased to prepare and couple the cars, and the remainder of the crew, including the foreman, to see that they were moved in such a way as to give him an opportunity to do so with promptness and in reasonable safety. There was little difference in the testimony as to the duty of the respective parties under any given circumstances. The real issue is sharply drawn in the statements of the two witnesses, Mr. Kerr for plaintiff and Mr. Lonegan for defendant. Mr. Kerr said that Mr. Lonegan signalled deceased that he was going to shove in on track five and to couple up. If this were true there is little or no question in the testimony that it was the duty of the foreman to wait for the signal of the deceased before shoving the cars to a contact with those to which they were to be coupled. Mr. Lonegan, the foreman, explicitly denies that he signalled the deceased to couple the cars or even to go to track five at all, but says he had told him to "let them go to hell." These witnesses were men of great experience in this class of work and each knew the importance and bearing of the statement he was making. Mr. Kerr knew that his
242 version imposed upon the defendant the duty of exercising reasonable care, in conformity to the practice in such cases, for the protection of deceased in the work to which he had been assigned; while Mr. Lonegan knew that his version completely exonerated the defendant.

The instruction to which we have referred was fully authorized by the evidence. We have carefully read the Missouri authorities cited by defendant on the question of the care due servants employed in railroad yards, and find nothing in any of them to indicate that the railroad company, as master may, with impunity, disregard those rules which they have established for the purpose of increasing the

efficiency of their employees by assuring them protection while they give undivided attention to their work. The contention that employees under such circumstances are not entitled to the protection impliedly promised them, has been fully considered by this court in Penney vs. Stock Yards Company, 212 Mo., 309, and Richardson vs. Railroad, 223 Mo., 325. In the case first cited we said: "But it is said on behalf of the defendant that the fact that there is a custom to do a thing in a certain way is no defense to a plea of contributory negligence when the manner of doing a thing is per se negligent. As to this proposition no authority is necessary; it is self-evident. But this whole contention is based upon the assumption that the deceased knew that the engine would be started without a signal from either himself or his fellow switchmen and without warning from the engineer, whereas the whole testimony tends to show that it was the duty of the engineer not to move the cars until he had received a signal either from Penney or one of the other switchmen, and that he was not called upon to anticipate that the engine would be moved until all the hogs were unloaded, and not then until the engineer had given a proper warning."

So in this case the whole contention that the deceased was guilty of contributory negligence is based upon the assumption that
243 he knew that the engine would shove in the six cars without a signal from himself.

4. The defendant complains of the refusal of his instruction number nine, in which he asked that the jury be told that if it would have been safer to attempt to open the knuckles of the coupler by standing at the side of the draw bar instead of against it and that the deceased voluntarily selected the more dangerous way, their verdict should be for the defendant. There are numerous faults in this instruction, some of which are the following: (1) The deceased had notice that the other cars would be moved down to the coupling whenever he called for them, and if, as the evidence tends to show, it was the duty of the engineer and foreman to await his signal before making the movement, he had the right to assume that they would perform that duty, and to do his work in the most expeditious and convenient way consistent with reasonable care under those conditions. (Penney vs. Stock Yards Co., supra). (2) According to the evidence the car upon which he was at work was moving and he was compelled to follow it and the instruction assumes that under these circumstances it was practical for him to perform the work while walking beside the draw bar. (3) The instruction tells the jury that if it were safer for him to "attempt" to do the work standing at the side of the draw bar instead of against it, the verdict should be for the defendant regardless of whether it would have been possible to accomplish it in that manner. (4) There is no inflexible rule of law that both practicability and efficiency must in all cases be subordinated to absolute safety, as is implied in this instruction. It was properly refused.

Instruction number ten was also properly refused. (1) It told the jury that if the deceased had notice that cars would be shoved

in on track number five, their verdict must be for the defendant, entirely disregarding the evidence of the practice or custom in doing this work to stop cars being moved for that purpose
244 to wait the signal of the switchman in charge of the coupling before making the contact. (2) Because the words with which the instruction closes—"unless you believe from the evidence that the deceased was not in a position to see the movement of said cars to avoid being struck thereby," are incomprehensible, there being nothing to indicate whether the reference to his "position" related to some intervening object or obstruction to his sight or to the fact that his face was turned toward the car he was following, and upon which he was working.

5. The instruction given for plaintiff upon the measure of damages told the jury: "If you find for the plaintiff, you will assess her damages, in your discretion, at not less than two thousand and not exceeding ten thousand dollars." The appellant complains of this on the ground that the action was brought under section 5426, while the instruction prescribed the minimum recovery under section 5425, of the Revised Statutes of 1909. We have already disposed of this objection in a previous paragraph in which we hold that the action is framed upon the provisions of section 5425. It makes the further objection that the instruction treats the entire amount fixed by section 5425 as a penalty, overlooking the fact that it is penal only to the extent of $2,000.00 and compensatory above that amount. This is an erroneous view of the instruction. It says nothing about a penalty, omitting that word entirely, and only informs the jury, in the language of the statute, as to the minimum and maximum amounts at which they may assess the recovery. If there is error in omitting to inform them that $2,000.00 of this amount is a penalty in respect to which damages need not be shown, the error is in favor of the defendant, for by its terms it only authorizes a verdict for such damages as they may assess.

A similar instruction was given the jury in Murphy vs. Railroad, 228 Mo., 56. This court in banc disallowed the as-
245 signment of error founded upon the giving of this instruction, stating (through Lamm, J., whose divisional opinion was adopted by the court in banc) its grounds as follows:

"We disallow the assignment and put our disallowance on the grounds: First, that if the statute contemplates a theory of compensation then the jury had facts before them from which they could reasonably infer the worth of the man as a citizen; second, if the proper construction of the statute involves the notion that the jury should regard circumstances of aggravation or mitigation, attending the death of Fletcher, then such circumstances were fully exploited in the evidence; and, third (and mainly), we base our decision on the ground that the instruction on the measure of damages given for plaintiff was couched in the general language of the amendment. If, now, defendant thought itself entitled to a modification of that instruction so as to include specific and definite directions to the jury, it should have asked instructions on

that behalf. This it did not do, and it cannot complain of mere non-direction. (See Morgan vs. Mulhall, 214 Mo. 451, and cases cited.)"

The same instruction was given in Harding vs. Railroad, 248 Mo., 663, 668. This having been assigned for error, we said, through Bond, J., "We think there was no error in this. First, because the negligent failure of defendant's servants to cause the running orders of its trains to be observed was a negligence of the kind referred to in section 5425, Revised Statutes 1909; and the measure of damages specified in that section was properly stated in the instruction." In Powell vs. Railroad, 255 Mo., 420, the jury were instructed as follows: "The court instructs the jury that if you find for plaintiff then you shall assess her damages, if any, at such sum, if any, as you believe and find from the evidence to be a fair and just pecuniary compensation, only for damages, if any, to her and her daughter, Marjorie Powell, occasioned by the death of Frederick Powell, not exceeding the sum of ten
246 thousand dollars." The defendant asked no instruction attempting to point out the proper elements of damage. This court held, reviewing the authorities on that subject, that under the rule as settled in this state the appellant, before he can predicate reversible error on what the court does not say to the jury, *he* must first put the court in the wrong by asking it to say something. This is directly in line with that provision of our code which requires that no objection shall be taken on appeal or writ of error to any proceedings in the circuit court except such as shall have been expressly decided by said court. (R. S. 1909, sec. 2080.) It is not respectful to the legislature to say that a direction in the words of the statute which gives the action is a misdirection. It can at the most, only amount to non-direction.

The appellant cites us to Boyd vs. Railroad, 249 Mo., 110, to sustain *his* criticism of this instruction. In that case a question arose as to the propriety of admitting evidence of the age and earning capacity of the deceased husband in a suit by the widow under this same statute. This evidence was held proper upon the theory that the recovery authorized by this section was, to the extent of its excess over the minimum of $2,000.00, compensatory. In Pope vs. Railroad, decided in Division Number one of this court, and not yet reported, an instruction was given by the court of its own motion that if the jury should find for the plaintiff she was "entitled to recover from defendant a penalty of not less than $2,000.00 and not more than $10,000.00, the amount of such penalty within said limits to be determined by you in your discretion." This court said: "This was erroneous, (Boyd vs. Railway, 249 Mo., 110) but was in exact accord with defendant's requested instruction on the point and, consequently, it cannot complain." While this instruction went far beyond the terms of the statute in emphasizing the fact that the entire amount of the authorized recovery was a penalty, and impliedly excluded
247 the idea of damages, the remark quoted was obiter, and played no part in the decision. We see in it no evidence

of an intention to disturb the long line of decisions of this court which hold that non-direction with reference to the elements of damage or recovery is not reversible error, but that such matters must be directly presented to the court for decision by appropriate requests for instructions.

We see no error in the judgment appealed from and it is therefore affirmed.

STEPHEN S. BROWN,
Commissioner.

Per CURIAM:

The foregoing opinion of Brown, C., in Division, is adopted by the court in banc. Woodson, C. J., and Bond, J., concur. Walker, Blair & Revelle, JJ., concur in result. Faris, J. concurs in separate opinion. Graves, J., dissents in a separate opinion.

248 In the Supreme Court of Missouri. In Banc. April Term, 1916.

No. —.

MARGARET L. TABER, Respondent,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Separate Concurring Opinion.

I concur in the result reached in the majority opinion, but if the proof herein is in fact prima facie sufficient to bring deceased within the purview of the Federal Employers' Liability Act, then I so far fear that the matter would cut deeper than as set forth by our learned Commissioner that I am impelled to express my views upon the present status of the holding of the United States Supreme Court upon this question. For whether it is wise or unwise, logical or the converse, the fact remains, in my opinion, that the Supreme Court of the United States has held that the provisions of the above act are matters of substance as contradistinguished from mere matters of pleading and practice [Toledo &c. Ry. v. Slavin, 236 U. S. 454; St. Louis &c. Ry. v. Seale, 229 U. S. 156,] and therefore it follows that, whether the provisions of said act are pleaded upon either side or not, the right of recovery will be determined by the act nevertheless. This is an unfortunate, if not a mistaken view in my opinion. This view I think, overlooks the fact that the act under discussion does not repeal, nor nullify, nor supersede in all cases the statutes of the several states relating to damages for death or injury occurring in the service of a common carrier. It so operates only in a certain class of cases. The Federal act and the state statutes upon the subject are both living and "going concerns"; applying to cases arising daily, according to the facts thereof. In interstate phases the Federal statute applies and in such case wholly supersedes, and
249 may be said to nullify pro hac vice, the state statute upon the

subject. Not so however in cases of injuries occurring to an employe of a carrier engaged in intrastate traffic. In the latter cases the state statutes upon the subject are wholly applicable and the Federal statute wholly non-applicable. In some cases it is manifest it will become a sharply mooted issue of fact as to which statute applies. This issue from the very nature of the disputed facts can be resolved at times only by the triers of fact under instructions of the court. In such case the anomaly is presented of requiring the pleader either to choose his statute at his peril, and be "set afoot" for his error; or, as a novel alternative in procedure, to put the case to the jury upon the issues which are not made by the pleadings. [Toledo &c. Railroad Co. v. Slavin, 236 U. S. L. e. 457.] The first horn of this dilemma seems to require the taking of a backward step in jurisprudential progress; the second to be a procedural novelty which no rule of amendment however liberal, can always reach and save from the anomalous aspect suggested. The instant case is an example of a case which could not have been saved by amendment. So the dependents of a deceased employe of a carrier ought not to have their right to recover damages for his wrongful killing to depend (at times) wholly upon the ability of a lawyer to pick with certainty from the tangled and disputed facts the class into which the case falls.

To my mind it would seem to be the better rule to require the alleged fact of the applicability of the Federal *Employes'* Liability Act to be pleaded; since the state statute is not superseded in all cases; since it is at times a close question as to which statute is applicable, and since it has not yet (at the time I write) been held that the interstate character of the carrier, indubitably and finally determines the like status of the employe. If the Federal Act wholly abrogated the state statutes, and if (though this reason is less weighty than the other) the general status of the carrier once for all fixed and
250 settled the status of the employe, the rule might have more of argument and reason to sustain it. For there the excuse would be small for the pleader's error to correctly choose his statute or forum; since the maps would show the interstate character of most carriers, while now at times, it may become at best a happy guess to determine whether a brakeman was at the instant of injury handling an interstate or an intrastate box-car.

But be all this as may be, I cannot construe the late holdings of the United States Supreme Court to require the pleading of the Federal Employers' Liability Act. That these holdings, in my humble opinion, ought to so require, these hastily written views bear witness. But upon the point this was said in the case of Toledo &c. Ry. v. Slavin, supra, at pp. 456 and 457, viz:

"Neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act. But, over plaintiff's objection, evidence was admitted which showed that the train on which the plaintiff was riding, at the time of the injury was engaged in interstate commerce. Thereupon the Railroad Company insisted that the case was governed by the provisions of the Employers' Liability Act and moved the court to direct a verdict in its

favor. That motion having been overruled the defendant asked the court to give in charge to the jury several applicable extracts from the Federal statute. * * * But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.

251 "In this respect the case is much like St. Louis &c. Ry. v. Seale, 229 U. S. 156, 161, where the suit was brought under the Texas statute, but the testimony showed that the plaintiff was injured while engaged in interstate commerce. The court said: 'When the evidence was adduced it developed that the real case was not controlled by the state statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state court erred in overruling it.' The principle of that decision and others like it is not based upon any technical rule of pleading but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars."

So, in the light of this, the latest available ruling of the Supreme Court of the United States, however many mental reservations we may be permitted to exercise touching the strict adherence of this ruling to the reason of the case, to the spirit (as opposed to the letter) of progressive jurisprudence, and to the well-trodden paths of procedure, we are required to acquiesce in it by following it. [Donovan v. Wells, Fargo & Co. 265 Mo. 291.] Clearly to my mind at least, no harm would have been done, no pit-falls would have been dug for the feet of the doubtful, no lying in wait would have occurred to aid him who seeks only delay, and miscarriages of justice would have been minimized if it had been said that to be available as a defense the Federal Employers' Liability Act must be pleaded. Many of the state courts are said to have ruled thus, but in the light of the Seale case and the Slavin case it is idle to examine and consider whether this be so. [St. Louis &c. Ry. v. Seale, 229 U. S. 156; Toledo &c. Ry. v. Slavin, 236 U. S. 454.]

252 But (coming down to the concrete case), if this Federal question is in this case it got here solely from the facts that one Kay, a witness for plaintiff, said in reply to a question as to why deceased and he were coupling cars on track five, that they were thereon "preparatory to making up the train for the west"; and because the witness Lonergan, testifying for defendant, said: "We were pulling a drag of cars off of track No. 5 loaded with empties; we were making up train 53 on track No. 9, west bound train." I do not think that the adventitious interpolations coming thus into

the case even prima facie, show that deceased was engaged in interstate commerce at the time he was killed. For the question is presented here upon a demurrer to the sufficiency of the evidence to make out a case. We are therefore, in such case required to resolve all inferences against him who demurs. Doing this we cannot in my opinion say that these two bits of gratuitously interpolated answers by the witnesses Kay and Lonergan prove that deceased was at work upon interstate business when he was killed. Hence, I bottom my concurrence on the Federal question in the case wholly upon the facts in evidence, doubting the law to be as our learned Commissioner has written it, but reserving the privilege to regret that it is not.

C. B. FARIS, *Judge*.

253 In the Supreme Court of Missouri. In Banc. April Term, 1916.

No. 17320.

MARGARET L. TABER, Guardian, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Appellant.

Dissenting Opinion.

In this case there is some evidence tending to show that interstate cars were being handled in the making up of the train upon which the deceased was working at the time of his injury. It is not as clearly shown as it might be, because it would seem that both parties were proceeding more or less under the state law. It is clear enough however to show that the deceased was engaged in interstate commerce at the time of the accident. In fact the evidence shows that, at the time of the accident, the employes of defendant were making up train No. 53 for the west. We take judicial notice that Kansas City, Mo., is on the Kansas-Missouri state line, and if train No. 53 was a train being made up for a point west of Kansas City, it would have to be interstate and not intra-state. A witness for plaintiff said the train then being made up in the yard was a train for the west. One of defendant's witnesses said: "We were making up train No. 53 on track 9, west bound train."

Now deceased when injured was engaged in the very work of coupling the cars together for this train, shortly to start west-ward from Missouri. He was assisting in making up an inter-state train. If so the action should have been brought under the Federal Act, and by his legal representative and not by the minor children of deceased by and through their guardian. The two rights of action are separate and distinct in so far as the parties entitled to sue and recover are concerned. Under the state law, the widow, for a given time, has the right to sue, but if within that time she fails to appropriate the action, then the minors can sue. We speak of the state law at the time this action accrued. Under the Federal act,

254 the legal representatives of the deceased alone could sue. The right to sue under the two respective acts is lodged in persons totally different. Under the Federal act these minors could not sue at all. Their petition would have stated no cause of action for them.

We fully stated our individual views in the separate concurring opinion in the case of Cora Sells vs. A. T. & S. F. Ry. Co. handed down at this term of the court but not yet officially or otherwise reported. We refer to that opinion in connection herewith. Since writing the separate concurring opinion in the Sells case, supra, our attention has been called to the case of Chicago R. I. & P. R. Co. vs. Wright, U. S. Adv. ops. 1915 page 185. And it has been even gently hinted that the opinion by the U. S. Supreme Court is contrary to our views in the Sells case. We don't so understand the Wright case, supra. In the Sells case, as in the case at bar, we tried to say that the parties plaintiff had no right to recover because the evidence at the trial showed an interstate case, and the cause of action or right to sue was in the personal representatives alone. In other words in the executor or administrator.

Now in the Wright case, supra, which came from Nebraska, the suit under the state law was brought in the name of the personal representatives. The same persons would have had to *brought* the suit under the Federal Act. Both the state law and the Federal Act lodged the right to sue in the same person. Not so in this case nor the Sells case, supra.

In the Wright case, supra, all the U. S. Supreme Court holds, is that an instruction according to the State law of contributory negligence was harmless, because such instruction was more favorable to the defendant than would have been a proper instruction under the Federal act. That court does not undertake to say that a widow, or the minor children of a deceased person, can recover under the state law, in a case where the evidence shows the right of action to be in the personal representative of deceased under the Federal
255 act, rather than in his widow or children. The distinction is so clear and marked that we will not discuss it.

In such case when the widow or minor children of a deceased person sue under our state law (as it then existed) for the negligent killing of the deceased, and the evidence shows that deceased was engaged in interstate commerce, they can not recover, because they show that some other person (the legal representative) is entitled to the recovery. The demurrer to the evidence raises the question. Because the defendant, after the refusal of its demurrer to the evidence, asks for other instructions along the court's theory of the case does not change the situation. The Wright case, supra, does not gain-say this common sense proposition. For these reasons, I dissent in this case.

W. W. GRAVES, *J.*

256 In the Supreme Court of the State of Missouri.

And thereafter, to-wit, on the 13th day of October, 1916, the following further proceedings were had and entered of record in said cause, to-wit:

MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Now at this day there are presented by the said appellant, The Missouri Pacific Railway Company, to the Honorable Archelaus M. Woodson, Chief Justice of the Supreme Court of Missouri, in chambers, a petition for a writ of error and a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, an assignment of errors, a citation to the said respondent (defendant in error), citing and admonishing her to be and appear in the Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof, and a supersedeas bond in the sum of $21,000.00; which said writ of error is allowed, said assignment of errors ordered filed, said citation signed and ordered issued, and said bond, to operate as a supersedeas, approved and ordered filed.

257 UNITED STATES OF AMERICA,
State of Missouri, ss:

In the Supreme Court of the United States, October Term, 1916.

No. —.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Defendant in Error.

In the Supreme Court of Missouri.

No. 17320.

MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

To the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate justices of the Supreme Court of the United States, and to the Honorable Archelaus M. Woodson, Chief Justice of the Supreme Court of the State of Missouri:

Your petitioner, The Missouri Pacific Railway Company, a consolidated railroad corporation organized and existing under
258 and by virtue of the laws of the states of Missouri, Kansas and Nebraska, respectfully shows that the Supreme Court of the State of Missouri on the 15th day of May, 1916, during the regular April Term, 1916, of said Court, rendered judgment against your petitioner in the above entitled cause, wherein Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small and Margaret G. Small, Minors, was Respondent in said court and your petitioner was appellant in said court, by which said judgment said Supreme Court of Missouri affirmed a judgment of the Circuit Court of Jackson County, Missouri, rendered in favor of said Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small and Margaret G. Small, Minors, as plaintiffs in said Circuit Court and against The Missouri Pacific Railway Company, your petitioner, as defendant, for the sum of Eight Thousand ($8000.00) Dollars, and for the costs of said action, and the said judgment of said Supreme Court of the State of Missouri, affirming said judgment so rendered by the Circuit Court of Jackson County, Missouri, became, on the said 15th day of May, 1916, the final judgment of said Supreme Court; and your petitioner further respectfully shows that under the Constitution and Statutes of the State of Missouri, the said Supreme Court is the highest court of said state of Missouri in which a decision in said suit and a review of the judgment of said Circuit Court of Jackson County, Missouri, can be had; and your petitioner respectfully says that it feels aggrieved by the proceedings and judgment of said Supreme Court of Missouri in said cause and claims the right to remove said cause and said judgment and decision of said court to the Supreme Court of the United States, by writ of error, as provided by the statutes of the United States, because of and for the following reasons:

One. This action was instituted by the plaintiff, Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small and Elizabeth G. Small, Minors, minor children of Charles H. Small, in the Circuit Court of Jackson County, Missouri, at Kansas City, on the 21st day of September, 1910, to recover a judgment against the de-
259 fendant, The Missouri Pacific Railway Company, for the sum of Ten Thousand ($10,000.00) Dollars as damages as provided under and by virtue of Sections 5425, 5426 and 5427 of the Revised Statutes of Missouri for 1909, on account of the death of said Charles H. Small which occurred on the 9th day of April, 1910, while he was employed by the defendant, The Missouri Pacific Railway Company, as a switchman in its switch yards in Kansas City, Missouri, all of which appears by reference to the record in the proceedings in said cause.

Two. Your petitioner, the defendant in said cause, duly answered the petition of said plaintiff, by which answer it denied generally each and every allegation in the said plaintiff's petition contained. And your petitioner further alleged in said answer, by way of defense to the said petition, that the injury and death of the said Charles H. Small was due to his own carelessness and negligence directly contributing thereto for which the defendant was in no way

responsible, and further that the injury and death of said Charles H. Small was due to a risk incident to the employment in which he was engaged by the defendant, all of which appears by the record of the proceedings in said cause.

Thereupon the plaintiff filed a Reply to said Answer of the defendant which reply was a general denial of all the allegations in said answer contained, as shown by the record of the proceedings in said cause.

Three. Thereafter, on the 19th day of March, 1912, said cause came on for trial upon the issues presented by said pleadings in said Circuit Court of Jackson County, Missouri, and evidence was adduced on behalf of the plaintiff, and also on behalf of the defendant, and the defendant, at the close of the evidence adduced on behalf of plaintiff, and again at the close of all the evidence in said cause prayed the court to declare as a matter of law, and to instruct the jury, that under the pleadings and the evidence adduced in said cause the plaintiff was not entitled to recover, which said prayer and request was by the court overruled and denied, to which action
260 and ruling of the court the defendant at the time duly excepted, and thereupon said cause was by the court submitted to the jury under instructions permitting the plaintiff to recover under and by virtue of the statutes, laws and decisions of the state of Missouri, which said instructions were given over the objections and exceptions of the defendant duly made at the time, and said trial resulted in a judgment in favor of the plaintiff, and against the defendant, for the sum of Eight Thousand ($8,000.00) Dollars damages and for the costs of said action.

And the defendant, your petitioner, says that said trial court by denying said prayers and requests of said defendant, your petitioner, hereinabove referred to, and in submitting said cause under instructions permitting a recovery by the plaintiff under the statutes and laws and decisions of the state of Missouri, and by rendering said judgment against this defendant, denied this defendant rights, privileges and immunities claimed by the defendant, your petitioner, under the Act of Congress commonly known as the Federal Employers' Liability Act, being an Act of Congress entitled: "An Act Relating to the liability of Common Carriers by railroad to their employees in certain cases," approved April 22nd, 1908, (35 United States Statutes at Large, page 65, chapter 149), and the amendments to said Act of Congress, approved April 5th, 1910, (36 United States Statutes at Large, page 291, chapter 143), and the decision of said court was and is against the rights, privileges and immunities specially set up and claimed by this defendant under and by virtue of said Act of Congress, all of which appears by the records and proceedings in said cause, to which reference is hereby made.

Four. That, thereafter, an appeal was duly taken from said final judgment of said Circuit Court to the Supreme Court of the State of Missouri, which court, under the Constitution and laws of the State of Missouri had and has exclusive jurisdiction to hear and determine said cause upon appeal from said Circuit Court, and that said cause came on for hearing in said Supreme Court and said Court

thereafter rendered judgment and decision against the de-
261 fendant, your petitioner, which became final on the 15th day of May, 1916, as aforesaid, by which the judgment and decision of the Circuit Court of Jackson County, Missouri, was affirmed. And said judgment and decision of the Supreme Court of the State of Missouri was, and is, against the title, rights, privileges and immunities, specially set up and claimed by this defendant, your petitioner, under and by virtue of said Acts of Congress, aforesaid, and said judgment and decision of said Supreme Court of the State of Missouri was, and is, also against the rights, privileges and immunities specially set up and claimed by this defendant, your petitioner, under the decisions of the Supreme Court of the United States in the following cases:

St. Louis etc. Ry. v. Seale, 229 U. S. 156;
Toledo, etc. Ry. v. Slavin, 236 U. S. 454;
Seaboard Air Line R. Co. v. Horton, 233 U. S. 492;
New York Central etc. R. Co. v. Bernard J. Carr, 238 U. S. 260;
Pennsylvania R. R. Co. v. Donat, (Decided Nov. 1, 1915) 36 Supreme Court Reporter, p. 4;
Pecos & Northern Texas Ry. Co. v. Rosenbloom, (Decided March 13, 1916) 36 Supreme Court Reporter, p. 390;
North Carolina Ry. Co. v. Zachary, Admr. of Burgess, 232 U. S. p. 248.

All of which appears by the record and proceedings in said cause, to which reference is hereby made.

Wherefore, the premises considered, your petitioner prays the Court that it may be awarded a Writ of Error issuing out of the Supreme Court of the United States, addressed to the Supreme Court of the State of Missouri, and that your petitioner be allowed to bring up for review before the Supreme Court of the United States the said judgment and decision of the Supreme Court of the State of Missouri for the purpose of enabling said Supreme Court of the United States to examine and correct the errors assigned, as shown by As-
262 signments of Error exhibited herewith and for such other and further proceedings, and relief, as to the said Supreme Court of the United States may seem proper, for which your petitioner will forever pray.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By EDWARD J. WHITE,
THOS. HACKNEY AND
MARTIN LYONS,
Attorneys for Petitioner.

Writ of Error Allowed this 13th day of October, A. D. 1916.
By A. M. WOODSON,
Chief Justice of the Supreme Court of the State of Missouri.

262½ [Endorsed:] Case No. 17320. Div. No. —. In the Supreme Court of Mo. Margaret L. Taber, Guardian, Respond-

ent, vs. The Missouri Pacific Ry. Co., Appellant. In the Supreme Court of the United States. The Mo. Pac. Ry. Co., P. E., vs. Margaret L. Taber, D. E., Guardian. Petition For Writ of Error. Filed Oct. 13, 1916. J. D. Allen, Clerk.

263 UNITED STATES OF AMERICA,
State of Missouri, ss:

In the Supreme Court of the United States, October Term, 1916.

No. —.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Defendant in Error.

In the Supreme Court of Missouri.

No. 17320.

MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Assignment of Errors.

Now comes The Missouri Pacific Railway Company, a corporation, Plaintiff in Error, and makes and files this its Assignment of Errors and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above entitled cause, there is manifest error in this, to-wit:

1. Said Supreme Court of the State of Missouri erred in holding adjudging and determining as follows:

"The Federal Statute which the appellant now invokes is section 8657 of the Compiled Statutes of 1913. So far as it is applicable to this case, it is as follows:

'Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be
264 liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier.'

"No reason has been suggested why this petition does not state all the facts necessary to a recovery by these children under the Missouri statute cited. That it does not state a cause of action in favor

of the personal representative of the deceased under the federal statute is clear, for there is no statement of the vital fact that the injury was inflicted while the defendant was engaging in commerce between the states and territories, and while the deceased was employed by it in such commerce. The state court having jurisdiction to entertain the action under both statutes, its proceedings must be judged by its own practice, which requires an answer which shall contain a statement of any new matter constituting a defense. R. S. #1806. It follows, from the statement in the petition of all the facts necessary to constitute a perfect cause of action under the state statute, that if it is sought to defeat it, by showing the additional facts that the injury was inflicted while the defendant was engaging in interstate commerce, and while the deceased was employed by it in such commerce, those facts should have been pleaded in the answer. This was the first step provided by the Missouri Code for presenting such matters for the determination of the Court."

2. The said Supreme Court of the State of Missouri erred in holding, adjudging and determining, as follows:

"At the trial it was stated in evidence that one of the objects of the work in which deceased was engaged was the making up of a train to go west to some destination not named and by some of the several lines of the defendant's railroad that cross the western frontier of the state at various distances from Kansas City, and that certain cars bore initials, the meaning of which is not stated, but of which counsel for defendant asks us to take judicial notice. If this testimony tended to prove that the appellant and deceased were engaged in interstate commerce at the time of the injury, there was still an opportunity under the Missouri Code for the defendant to conform his answer to such evidence and to have the question submitted to the jury. Instead of doing this, he asked, and the court granted, its submission upon the theory, inconsistent with the terms of the federal statute, that contributory negligence on the part of the deceased constituted a complete defense to the action. To raise the question upon appeal the statute expressly requires (R. S. 1909 #2081) that it should appear in the record that it was submitted to the determination of the trial court, and was expressly decided against the appellant. There is nothing in the record indicating this. On the contrary, the appellant, after having availed himself of the defense of contributory negligence under the state statute and lost, is now seeking to recede, because, for the purpose of gaining this advantage, to which it was not entitled, it had concealed its real defense. The Employers' Liability Act bears none of the marks of having been enacted for such a purpose. Having digged this pit, it is appropriate that the appellant should have been the one to fall into it. The question of the application of the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65; U. S. Comp. St. 1913 ##8657-8665) not having been decided by the trial court, no exception with respect to it can be taken here."

265 3. The said Supreme Court of the State of Missouri erred in holding, adjudging and determining that under the evidence in said case the liability, if any, of Plaintiff in Error (Defendant be-

low) on account of the death of Charles H. Small, to recover damages for whose death said action was brought, was not and is not regulated and controlled by the Act of Congress, commonly known as the Federal Employers' Liability Act, being an act entitled: "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22nd, 1908 (35 U. S. Statutes at Large, p. 65, chapter 149) and by the amendments to said Act, approved April 5, 1910, (36 U. S. Statutes at Large page 291, chapter 143); and that the said liability, if any, was and is controlled and regulated by the statutes and laws of the State of Missouri.

4. Said Supreme Court of the State of Missouri erred in holding, adjudging and determining that the Plaintiff in Error, (Defendant below) had waived its right to insist that its liability, if any, for damages on account of the death of Charles H. Small, was governed and controlled by the said Act of Congress, commonly called Federal Employers' Liability Act.

5. Said Supreme Court of the State of Missouri erred in holding, adjudging and determining that the said action could be maintained and prosecuted by the Defendant in Error, (Plaintiff below) as the Guardian of the minor children of the deceased, Charles H. Small, to recover damages on account of his death and in holding, determining and adjudging that the Plaintiff in Error, (Defendant below) had waived its right to rely upon the provisions of said Act of Congress, commonly known as the Federal Employers' Liability Act, hereinabove referred to, requiring the action for death of an employee to be brought and maintained by the personal representative of such deceased, and in further holding determining and adjudging that under the pleadings and evidence the said action could be maintained and prosecuted by the said defendant in error as the Guardian of said minor children of said deceased, Charles H. Small, under the laws of the state of Missouri.

266 6. Said Supreme Court of the State of Missouri erred in declining to hold, adjudge and determine that under the undisputed evidence adduced in the trial court on the trial of said cause the Plaintiff in Error, (Defendant below) and the deceased, Charles H. Small, were at the time of the fatal injury of said Charles H. Small engaged in interstate commerce, and in further declining to hold, adjudge and determine that the liability of the Plaintiff in Error, (Defendant below) if any, on account of the death of Charles H. Small, was controlled by, and a recovery, if any, could be had only under the said Act of Congress commonly called the Federal Employers' Liability Act, and that said action could be brought and maintained only by the personal representative of the deceased.

7. Said Supreme Court of the State of Missouri erred in holding adjudging and determining that notwithstanding it appeared in evidence on the trial of the cause that the Plaintiff in Error, (Defendant below) and its deceased employee, Charles H. Small, were engaged in interstate commerce at the time of the fatal injury to said Small, yet that unless the defendant below specially pleaded in its answer such facts, and had invoked in its said answer the said Federal Em-

ployers' Liability Act, as a special defense to the action by the Guardian of the minor children of said deceased, the state statute would apply to the case and a recovery could be had thereunder by the said Guardian regardless of the fact that the right of action was by said Federal Employers' Liability Act vested solely in the legal representative of the deceased.

8. Said Supreme Court of the State of Missouri erred in holding, adjudging and determining that under the pleadings and evidence in said cause the Guardian of the minor children of the deceased, Charles H. Small, was entitled to maintain said action and recover judgment for damages against the defendant in said action regardless of the provisions of the said Federal Employers' Liability Act, invoked as a defense to said action by Plaintiff in Error, (Defendant below).

267 9. Said Supreme Court of the State of Missouri erred in entering judgment, affirming the order, ruling and judgment of the Circuit Court of Jackson County, Missouri, refusing to give to the jury the following instruction requested by and on behalf of the Plaintiff in Error, (Defendant below), at the trial of said cause and at the close of all the evidence:

"The court instructs the jury that under the law and evidence in this case your verdict must be for the defendant."

to which action of the Trial Court in refusing to give said instruction to the jury, Plaintiff in Error, (Defendant below) duly objected and excepted at the time.

10. Said Supreme Court of the State of Missouri erred in entering judgment, affirming the decision and judgment of the Circuit Court of Jackson County, Missouri in said cause.

Wherefore, Plaintiff in Error prays this court to examine and correct the errors assigned and for a reversal of the judgment and decision of said Supreme Court of the State of Missouri entered in the above entitled cause, and that said Supreme Court of the State of Missouri be directed to reverse the judgment rendered in said cause by the Circuit Court of Jackson County, Missouri, at Kansas City, and that the plaintiff in Error have and recover of Defendant in Error all costs herein expended, and such other and further relief in the premises as may be just.

EDWARD J. WHITE,
THOS. HACKNEY AND
MARTIN LYONS,
Attorneys for Plaintiff in Error.

267½ [Endorsed:] Case No. 17320. Div. No. —. Supreme Court of Missouri. Margaret L. Taber, Guardian, Respondent, vs. The Missouri Pacific Ry. Co., Appellant. U. S. Supreme Court. The Mo. Pac. Ry. Co., P. E., vs. Margaret L. Taber, Guardian, D. E. Assignment of Errors. Edw. J. White, Thos. Hackney, Martin Lyons, Att'ys for The Mo. Pac. Ry. Co. Filed Oct. 13, 1916. J. D. Allen, Clerk.

268 UNITED STATES OF AMERICA,
State of Missouri, ss:

In the Supreme Court of the United States, October Term, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Defendants in Error.

In the Supreme Court of Missouri.

No. 17320.

MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, Margaret G. Small, Minors, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Supersedeas Bond.

Know All Men By These Presents: That we, The Missouri Pacific Railway Company, as principal, and H. T. Abernathy and Wm. A. Wilson, as sureties, of the County of Jackson and State of Missouri, are held and firmly bound unto Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small and Margaret G. Small, minors, in the sum of Twenty-one ($21,000.00) Thousand Dollars, lawful money of the United States, to be paid to her, her successors, executors and administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and each of our successors, heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated this 10th day of October, 1916.

Whereas, the above named, The Missouri Pacific Railway Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of the State of Missouri in the above entitled cause.

Now, Therefore, the condition of this obligation is such that if the above named Missouri Pacific Railway Company shall prosecute its said writ of error to effect and if it fail to make its plea good shall answer all damages and costs, then this obligation shall be void, otherwise to remain in full force and effect.

269 (Signed) THE MISSOURI PACIFIC RAILWAY COMPANY,
[SEAL.] By —— ——, *Vice-President.*

Attest:
F. W. IRLAND,
Assistant Secretary.

H. T. ABERNATHY. [SEAL.]
WM. A. WILSON. [SEAL.]

STATE OF MISSOURI,
County of Jackson, ss:

On this 10th day of October, 1916, personally appeared before me H. T. Abernathy and Wm. A. Wilson, respectively, known to me to be the persons who executed the above and foregoing instrument, as parties thereto, and respectively acknowledged, each for himself, that he executed the same as his free act and deed for the purposes therein set forth.

And the said H. T. Abernathy and Wm. A. Wilson, respectively, being by me duly sworn, each for himself, and not one for the other say- that he is a resident and hous-holder of said County of Jackson; that he is worth the sum of $25,000.00 over and above his just debts and legal liabilities and property exempt from execution.

H. T. ABERNATHY.
WM. A. WILSON.

Subscribed and sworn to before me this 10th day of October, 1916. My commission expires July 22nd, 1917.

[SEAL.] ESTELLE M. MOORE.
Notary Public.

The within bond is approved, both as to sufficiency and form, and it is ordered that the same shall operate as a supersedeas until the final disposition of the said writ of error in said cause in the Supreme Court of the United States or until the further order of this Court.

Dated this 13th day of October, 1916.

A. M. WOODSON,
Chief Justice of the Supreme Court of the State of Missouri.

270 In the Supreme Court of the United States, October Term, 1916.

No. —.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Missouri at the April Term, A. D. 1916, before you, being the highest court of law or equity of said State in which a decision

could be had in said suit between Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small and Margaret G. Small, Minors, Respondent, and The Missouri Pacific Railway Company, Appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the laws of the United States, and the decision was in favor of their validity, or wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such statute; a manifest error has happened to the great damage of the said The Missouri Pacific Railway Company, as by its complaint appears.

271 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 12th day of November, 1916, next, in the said Supreme Court, to be then and there held to the end that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness: The Honorable Edward Douglass White, Chief Justice of the said Supreme Court, and the seal of the District Court of the United States for the Central Division of the Western District of Missouri, issued at Jefferson City, Mo., this 13th day of October, in the year of our Lord One Thousand Nine Hundred and Sixteen.

[Seal of the United States District Court, Central Division, Western District of Missouri.]

JOHN B. WARNER,
Clerk of the United States District Court for the Western District of the State of Missouri, Central Division.

By H. C. GEISBERG,
Deputy Clerk.

Allowed this 13th day of October 1916
By A. M. WOODSON,
Chief Justice of the Supreme Court of the State of Missouri.

271½ [Endorsed:] Case No. —. The Mo. Pac. Ry. Co., Plaintiff in Error, vs. Margaret L. Taber, Guardian, etc., Defendant in Error. Writ of Error. Filed Oct. 13, 1916. J. D. Allen, Clerk.

272 In the Supreme Court of the United States, October Term, 1916.

No. —.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MARGARET L. TABER, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Missouri, wherein The Missouri Pacific Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Archelaus M. Woodson, Chief Justice of the Supreme Court of the State of Missouri this 13th day of October, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

A. M. WOODSON,
Chief Justice of the Supreme Court of the State of Missouri.

Service of this citation accepted this 14th day of October, 1916.
COWHERD, INGRAHAM & DURHAM,
Attorneys for Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Defendant in Error.

272½ [Endorsed:] Case No. —. The Mo. Pac. Ry. Co., Plaintiff in Error, vs. Margaret L. Taber, Guardian, Defendant in Error. Citation. Filed Oct. 13, 1916. J. D. Allen, Clerk, Per M.

273 STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri certify that the foregoing is a full, true and complete transcript of the record and proceedings and all papers filed in the case of M. L. Taber, Guard., resp. (D. E.) vs. Missouri Pacific Ry. Co.,

app., (P. E.) as called for by the præcipe filed herein, as fully as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Missouri, at my office in the City of Jefferson this 20th day of October, 1916.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 25,590. Missouri Supreme Court. Term No. 760. The Missouri Pacific Railway Company, plaintiff in error, vs. Margaret L. Taber, Guardian of Harry H. Small, Grace L. Small, and Margaret G. Small, Minors. Filed October 30th, 1916. File No. 25,590.

No. 760.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

MARGARET L. TABER, GUARDIAN OF HARRY H. SMALL, GRACE L. SMALL AND MARGARET G. SMALL, MINORS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

EDW. J. WHITE,
THOS. HACKNEY,
MARTIN LYONS,
Attorneys for Plaintiff in Error.

No. 760.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

MARGARET L. TABER, GUARDIAN OF HARRY H. SMALL, GRACE L. SMALL AND MARGARET G. SMALL, MINORS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT.

This case comes to this court on writ of error to review the judgment of the Supreme Court of the State of Missouri rendered May 15th, 1916, affirming the judgment of the State Circuit Court for $8000.00 damages in favor of the defendant in error and against the plaintiff in

error. The action grows out of the death of Charles H. Small, a switchman in the employ of the plaintiff in error, at its yards in Kansas City, Missouri, and the suit was brought by the defendant in error as guardian of the three minor children. The opinion of the State Supreme Court, written by Commissioner Brown, was concurred in by two of the seven judges; three of the judges concurred generally in the result, and one concurred in the result in a separate opinion, while one judge dissented (Rec. p. 149).

The Commissioner's opinion held that the question of the application of the Federal Employers' Liability Act was not properly raised in the pleadings; that it was necessary for it to be thus raised before the Act would be considered, notwithstanding evidence was introduced by both parties, without objection, tending to show that the employer and the employee were engaged in interstate commerce at the time of the fatal injury. In a separate opinion, concurring in the result, Faris, J., held that there was not sufficient evidence of interstate commerce. Graves, J., in a dissenting opinion, held that there was sufficient evidence of interstate commerce and that the question was properly raised and that the defendant in error, as guardian of the minor children, could not maintain the action but that the right of action was vested solely in the personal representative of the deceased for the benefit of the persons named in the Act of Congress.

The petition of the defendant in error, as plaintiff below filed in the Circuit Court of Jackson County, Missouri, alleged two grounds of recovery of damages for the

death of Charles H. Small, to-wit: First: A violation of the Safety Appliance Act by defendant in that the drawhead or coupling device on one of the cars which he was endeavoring to couple up was out of repair and not in working order, so that the deceased was compelled to go between the cars to adjust the coupler in order to make the coupling, and Second: negligent conduct of the foreman in the giving of signals while deceased was between the cars adjusting the defective coupler.

Evidence adduced on the trial by the plaintiff tended to show that the coupler was defective so that it could not be opened by the pinlifter on the side and that this compelled the deceased to go between the cars and adjust the coupler with his hand and that while he was doing so he was killed (see testimony of W. C. Kay, witness for plaintiff, pp. 28, 29, 30, 33, Record).

Plaintiff's instruction No. 1. on the question of liability submitted this proposition of the defective coupler to the jury in these words:

> "And if you find that said Charles H. Small did in obedience to said signal prepare to make said coupling and that it became necessary for him to go (and he did go) in and upon defendant's certain track No. 5 to adjust the coupling device of the cars already on said track on account of said device being out of working order, etc." (p. 125 Rec.).

The jury by their verdict under this instruction found the fact that the coupler was defective and hence that there was a violation by the defendant of the Federal Safety Appliance Act.

The evidence of both parties adduced at the trial showed that the deceased and the defendant were engaged in interstate commerce at the time of the injury. It was conceded that the switching crew of which deceased was a member was engaged in making up a train of loaded cars on track No. 9, and in order to accomplish this they were compelled to separate the loaded cars from about 25 empty cars on track No. 5, by pulling out the whole number and placing the loaded ones on track No. 9 and putting the empty cars back on track No. 5. This train of loaded cars was conceded to be train No. 53—defendant's Red-Ball freight train destined for Colorado. It was described by the witnesses as follows:

W. C. Kay:

"Q. What were you doing, coupling up the cars that were loaded on that track?

"A. On that track, preparatory to making up a train for the west" (p. 17 Rec.).

John H. Lonegan:

"Well we coupled up track No. 5, that is where they held up the west stuff. Was going to make up train 53. We were going to make up train 53 on track 9."

"Q. What were you using track 5 for at that time?

"A. Well, there was some west empties mixed in among our west loads we were not going to use and we were holding them back in there on track 5" (p. 51 Rec.).

A. W. Mills:

"We were making up train 53 on track No. 9; westbound train (p. 96 Rec.).

"Making up Red-Ball train for Colorado" (p. 100 Rec.).

BRIEF.

I.

The petition alleged, the evidence showed and the jury found a violation by the defendant of the Safety Appliance Act with respect to the coupler and it was not necessary to plead that the act or omission of the defendant in permitting the coupler to become defective was negligently done.

> "The question whether the defective condition of the ladder was due to defendant's negligence is immaterial since the statute imposed an absolute and unqualified duty to maintain the appliance in secure condition."
>
> *Texas & P. R. Co.* v. *Rigsby*, 241 U. S. 33, 36 Sup. Ct. Rep. 482, 485.

Plaintiff having pleaded and proved a violation by defendant of the Safety Appliance Act and the jury having, under an instruction given on behalf of plaintiff below, found such violation as a fact, the liability was governed by the Safety Appliance Act and the recovery was governed, and could be had only, under the Federal Employers' Liability Act of April 22nd, 1908.

> *Atlantic City R. R. Co.* v. *Parker*, 37 Sup. Ct. Rep. 69.

The Supreme Court of Missouri erroneously treated the whole matter of averment of the defective coupler in the petition as a matter of inducement, when in fact it was an averment of substantive fact demanding the application of the Federal law to the case.

II.

The Missouri Supreme Court erred in holding that the facts proven without objection on the trial failed to show that the deceased, Charles H. Small, and his employer, the Railway Company, were at the time of the fatal injury engaged in interstate commerce.

It was conceded that the deceased and his switch crew were engaged in making up "westbound Red-Ball freight train 53 for Colorado," by pulling out a string of loaded and unloaded cars from track No. 5, separating the loaded from the unloaded cars, putting the loaded cars on track No. 9, making up train 53, and the unloaded ones back on track No. 5. This court must judicially know that the making up of a train of loaded cars in Missouri of freight destined to Colorado is interstate commerce.

The work of separating the loaded from the unloaded cars, by the pulling of the whole string of cars on track No. 5 and cutting out the loaded cars and throwing them onto track No. 9, and throwing the empty cars back on track No. 5, was all one act in the making up of the interstate train, and was interstate commerce.

N. Y. C. & H. R. R. R. Co. v. *Carr*, 238 U. S. 260; 35 Sup. Ct. Rep. 780.

Seaboard Air Line R. Co. v. *Koennecke*, 239 U. S. 352; 36 Sup. Ct. Rep. 126.

Penna. Co. v. *Donat*, 239 U. S. 50; 36 Sup. Ct. Rep. 4.

III.

The evidence having shown that the deceased and the Railway Company were engaged in interstate commerce at the time of the fatal injury, and having likewise shown a violation of the Federal Safety Appliance Act, the case was necessarily governed by the Federal Employers' Liability Act and not by the Statutes of Missouri.

Toledo St. L. & W. R. R. Co. v. *Slavin*, 236 U. S. 454, 35 Sup. Ct. Rep. 306.

St. L. S. F. & T. R. R. Co. v. *Seale*, 229 U. S. 156, 33 Sup. Ct. Rep. 651.

It was, therefore, the duty of the court to apply the Federal law to the case which would necessarily result in a directed verdict for the defendant, inasmuch as the plaintiff had no right to sue under the Federal Act.

See dissenting opinion of Graves, J., in this case (Rec. pp. 152, 153).

In the Slavin case, *supra*, no mention was made in the pleadings of the Federal Act but testimony was introduced as in the case at Bar, showing that the parties were engaged in interstate commerce. It was contended that because the pleadings did not raise the issue the Federal question was not involved. This court, however, said:

> "But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute, the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And if, without

> amendment, the case proceeded with proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal Statute, it was error not to apply and enforce the provisions of that law."

In the Seale case, *supra*, this court said:

> "When the evidence was adduced it developed that the real case was not controlled by the State statute, but by the Federal statute."

Speaking of the holding of this court in the Seale case, this court in the Slavin case, said:

> "The principle of that decision, and others like it, is not based on any technical rule of pleading but is matter of substance where, as in the present case, the terms of the two statutes differ in essential particulars."

The Federal law being the supreme law of the land and superseding the state statute must be applied to the admeasurement of rights and liabilities of the parties on the facts shown in evidence, whether pleaded or not. While trial courts may on account of the nature of the pleadings refuse to admit evidence of the facts bringing into application the Federal law, yet where this testimony is once admitted, whether without objection or even over the objection of either party, it then becomes a duty of every court to apply the supreme law of the land to the admitted facts in evidence. In no other way can the case be decided according to the law.

The cause of action pleaded in the petition was unknown to the Common Law (*St. L. S. & T. R. Co. v. Seale, supra*). It must rest, therefore, on some statute.

No state statute of Missouri was pleaded in the petition, nor was any Federal statute pleaded by the defendant, but plaintiff asserted a claim against the defendant under some unnamed statute, and the defendant denied the claim in the same way. The plaintiff in the case below had not averred in her petition that the deceased and his employer were engaged in *intrastate* commerce at the time of the fatal injury; had she done so, the case would have been different. Why, in the absence of such allegation of the plaintiff was the defendant below required to plead that the deceased was engaged in *interstate* commerce in order to designate the law under which the claim or defense must be made?

If the Federal law is supreme, then the duty of stating a case outside of the Federal law certainly was on the plaintiff below. If the state statute was no longer applicable except to intrastate commerce, then plaintiff should be required to plead intrastate commerce, if it was desired to have the state law apply to the case. But irrespective of what plaintiff below might or might not have been required to plead, yet when both petition and answer are silent as to the character of the commerce in which the deceased was engaged and the evidence adduced shows beyond dispute that it was interstate commerce, and that plaintiff has no right of action under the Federal law, the right being in another not a party to the suit, then indeed must a recovery be denied the plaintiff unless all substance is sacrificed to form.

We insist that where the plaintiff's petition below alleged a defective coupler, and the evidence tended to show,

and the jury under an instruction given found that the coupler was defective, thus requiring the deceased switchman to go between the cars to make the coupling, and where the undisputed evidence showed that the deceased at the time of the fatal injury was engaged in interstate commerce, no law but the Federal law could be applied to the case and by applying the Federal law the demurrer to the evidence must of necessity have been sustained; and that the trial court and the Supreme Court of Missouri erred in failing to apply the Federal law to the case; that a Federal question was necessarily and clearly involved, and denied the plaintiff in error, and that the motion to dismiss the writ of error should be denied by this court.

Respectfully submitted,

EDW. J. WHITE,
THOS. HACKNEY,
MARTIN LYONS,
Attorneys for Plaintiff in Error.

No. 760.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

MARGARET L. TABER, GUARDIAN OF HARRY H. SMALL, GRACE L. SMALL AND MARGARET G. SMALL, MINORS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF DEFENDANT IN ERROR ON THE HEARING OF THE CAUSE ON THE SUMMARY DOCKET.

JOHN T. WAYLAND,
Attorney for Defendant in Error.

R. J. INGRAHAM,
L. E. DURHAM and
HALE HOUTS,
On the Brief.

No. 760.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

MARGARET L. TABER, GUARDIAN OF HARRY H. SMALL, GRACE L. SMALL AND MARGARET G. SMALL, MINORS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT.

This case comes to this court on writ of error to review the judgment of the Supreme Court of Missouri, rendered May 15, 1916, affirming the judgment of the State Circuit Court for Eight Thousand Dollars damages for the death of one, Charles Small, while acting as

switchman in the employ of the Missouri Pacific Railway Company. The suit was filed in September, 1910, in the State Court by defendant in error, Margaret L. Taber, as guardian for the deceased's minor children.

The action was brought under the Statutes of Missouri and the case was tried by both parties on the theory that the State Statutes governed. On oral argument in the State Supreme Court and in the supplement brief, filed thereafter, plaintiff in error contended, for the first time, that the action was governed by the Federal Employers' Liability Act.

Deceased was killed while acting as switchman in the railway company's yards in Kansas City, Missouri. He was at the time adjusting the coupler of a car, in order to make a coupling, in obedience to the signal of his foreman, when other cars were "kicked" against him without warning and contrary to the customary way of doing the work, and he was crushed and instantly killed.

The crew, of which deceased was a member, had previously been making up a train on track No. 9. Certain cars, which had been in a drag of cars on track No. 5, had been removed and placed in this train. There remained of this drag a number of empty and bad order cars, which were put back on track No. 5 (Rec. pp. 80 and 103). At the time deceased was killed, all of the cars, which had been on track No. 5 and which were to go to make up the train, had been removed and the last of the bad order cars remaining were being kicked back on track No. 5. All of these cars on track No. 5 were to remain there indefinitely so far as the record shows (Rec.

pp. 53 and 81), and deceased was killed while attempting to couple together two of them (Rec. pp. 22, 34, 51, 53, 54, 66 and 81).

The negligence charged in the petition was the kicking in of the cars against deceased, without warning and contrary to the custom, while he was adjusting the coupler. The petition alleged that the coupler was out of order, but this allegation was by way of inducement and not stated as a ground of negligence. The statement of the plaintiff in error in its brief, to the effect that the petition alleged a violation of the Safety Appliance Act, is erroneous. The petition did not allege that the car was an interstate car or was moving in interstate commerce, nor, did it allege that the Railway Company was an interstate carrier and its line an interstate highway. There was no allegation in the petition which would bring it within the terms either of the Federal Employers Liability Act or of the Safety Appliance Act.

Plaintiff in error bases its contention that the Federal Employer's Liability Act governs this action upon the claim that the evidence showed that the train which had been made up on track No. 9 was an interstate train. The only evidence in regard to the character or destination of this train was the statement of plaintiff's witness, Kay, that they were "making up a train for the west" (Rec. p. 17); and the statement of defendant's witness, Mills, that they were "making up train 53 on track No. 9; west bound train" (Rec. p. 96), and "making up Red Ball train for Colorado" (Rec. p. 100).

No instruction was offered submitting the question to the jury.

The Supreme Court of Missouri refused to consider the contention there made by plaintiff in error, that the Federal Employers' Liability Act governed, because, it was held, the question had not been properly raised in the State Circuit Court. See, Assignment of Errors (Rec. pp. 158 and 161). Opinion of the Court (Rec. pp. 142 and 143).

The opinion in chief was written by Supreme Court Commissioner Brown, and was adopted by the court *en banc* (Rec. p. 149). Farris, J., concurred in a separate opinion, in which he held that the Federal question was not raised on account of insufficiency of the evidence (Rec. pp. 149-152). Graves, J., in a dissenting opinion, which was not concurred in by any of the other judges, held that a Federal Act governed the action, and that the judgment should be reversed (Rec. p. 152).

Coming to this court, the plaintiff in error, not in its assignment of errors, but in its brief, makes another and entirely new suggestion, namely: That the Safety Appliance Act governed the action. This will be considered in the argument hereinafter.

BRIEF AND ARGUMENT.

I.

The Safety Appliance Act has no application to this case and even if it did apply, it would have no bearing upon this writ of error.

The only question plaintiff in error seeks to bring to this court is the question whether the Employers' Liability Act governs the action. The assignment of errors contains no reference to the Safety Appliance Act. Neither the petition (Rec. p. 46) nor plaintiff's instruction No. I (Rec. pp. 124 and 125) were grounded upon a violation of the Safety Appliance Act, because neither contained the necessary interstate commerce element (32 Stat. at L. §943). Neither was there evidence that the Railway Company's line was an interstate highway, or, that the car was used in connection with interstate commerce.

It is wholly immaterial to this writ of error whether the Safety Appliance Act was violated. A violation of the Safety Appliance Act may give a cause of action either under the State law or the Federal Employers' Liability Act, depending upon whether the employee injured or killed was, himself, engaged at the time in interstate commerce.

Tex. Pac. Ry. Co. v. *Rigsby*, 241 U. S. 33, 36 Sup. Ct. Rep. 482.

San Antonio & Ark. Pass Ry. Co. v. *Wagner*, 241 U. S. 476, 36 Sup. Ct. Rep. 626.

The belated suggestion of the Safety Appliance Act can serve no purpose on this hearing.

II.

The decision of the Supreme Court of Missouri, holding that the question whether the Federal Act governed was not raised in the manner required by the Missouri practice is conclusive. Consequently this court has no jurisdiction, and the writ of error should be dismissed.

(a) *Plaintiff in error, in its assignment of errors, states, and properly states, that the Supreme Court of Missouri, by its decision held that the claim that the Federal question governed, was not made or denied in the State court according to the Missouri practice. Plaintiff in error is both bound by this statement of the Missouri court's ruling, and is here limited to a review of the correctness of this ruling by the Supreme Court of Missouri, because no other question is raised by the assignment of errors* (R. S., U. S. §997, Sup. Ct. Rules 21 and 35).

All of the assignments of error, except 9 and 10 (Rec. p. 161) were statements of this alleged error of the Supreme Court of Missouri in holding that the Federal question was not raised. Assignment 9 alleges error in failing to hold that the demurrer should have been sustained; and assignment 10 alleges error in the general affirmance of the judgment. These two assignments are not sufficiently specific to raise any question in this court.

Van Stone v. *Stillwell & Bierce Mfg. Co.*, 142 U. S. 128.

(b) *The decision of the Supreme Court of Missouri, that the alleged Federal question was not raised in the manner required by the State practice, and that court's*

refusal to consider the question upon its merits is conclusive and this court is without jurisdiction.

Both on the assignment of errors and on the order and opinions of the Supreme Court of Missouri, there can be no doubt that that court held that the question was not raised. In the opinion of Commissioner Brown, which was adopted as the opinion of the court en banc (Rec. p. 149) the court held that the question was not raised on the pleadings, and in addition to this, it was held by Farris, J., in separate concurring opinion, that the evidence was insufficient to raise the Federal question (Rec. pp. 149 to 152).

Whether or not a federal claim of right is properly raised in the state court, is a matter of state practice, and is for the decision of the state court of last resort.

N. C. R. R. v. *Zachary*, 232 U. S. 248, l. c. 257.

The decision of the Supreme Court of Missouri, that the claim was not properly made, and the refusal of that court to consider it on its merits, is conclusive, and this court will not assume jurisdiction.

Spies v. *Illinois*, 123 U. S. 131.
Erie R. R. v. *Purdy*, 185 U. S. 148.
L. & N. R. R. v. *Woodford*, 234 U. S. 46.
C. M. & St. P. Ry. Co. v. *Hanson*, 235 U. S. 693.
M. St. P. & St. M. Ry. Co. v. *Leora*, 235 U. S. 694.
St. L. & S. F. R. R. Co. v. *Shepherd*, 240 U. S. 240.

The Hanson and Leora cases presented situations identical with that presented in this case. In those cases,

the Supreme Court of Wisconsin (146 N. W. 524 and 520) held, as did the Missouri Supreme Court in this case, that the question whether the deceased was engaged in interstate commerce was not properly raised and refused to consider it on its merits. In each case the railroad company sought a reviewal in this court and this court dismissed the writ of error by opinion *per curiam*.

On the authority of these cases, we submit that this writ of error should be dismissed.

III.

Regardless of the decision of the Supreme Court of Missouri, this court will not consider this writ of error, for the reason that the alleged interstate character of the train was not sufficiently established by the evidence.

(a) *The evidence on the part of the plaintiff to the effect that it was a "train for the west" was no evidence that it was an interstate train.*

The case of *Osborne, Receiver* v. *Gray*, 241 U. S. 16; is directly in point. This court said (page 21):

> "It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the state. This contention we are unable to sustain. The make-up of the trains and the movement of cars are not matters which we may assume to know without evidence. The state court, with its intimate knowledge of the local situation, thought that such an assumption on its part would be wholly

> unwarranted, and we cannot say that it erred in this view. The fact that Chattanooga and its suburb, Alton Park, were near the state line did not establish that the cars had crossed it. The defendants knew the actual movements of the cars, and failing to inform the court upon this point cannot complain that they have been deprived of a federal right."

(b) *Defendant in error cannot take advantage of its own evidence tending to show the train was an interstate train, because it did not submit or seek to submit, the question to the jury by instruction.*

The only evidence in the Record tending to show that the train was an interstate train was the testimony of the Railway Company's witness, Mills, that it was "the Red Ball train for Colorado" (Rec. p. 100). The Railway Company did not submit or seek to submit the issue to the jury by instruction (Rec. p. 126 to 129). The issue was not raised by request of a peremptory instruction (Rec. p. 161). Upon the consideration of a case upon demurrer or upon peremptory instruction, all inferences are resolved in favor of the plaintiff. This precise question has recently been passed upon by this court in the case of *L. & N. R. E. Co.* v. *Parker*, 37 Sup. Ct. Rep. 4 (not yet officially reported) Mr. Justice Holmes, for the court, said (page 5):

> "But it is necessary to see how the case was dealt with in the trial court. The railroad company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce. It simply asked the court to direct a verdict, on the ground, among others, that it appeared as a matter of law that he was so engaged. But if the question

had been left to the jury, and they had disbelieved the testimony that the empty car was moved for the ulterior purpose of interstate commerce, there would have been no error of law in allowing a verdict for the plaintiff to stand. It is true that the judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary; and, as the railroad did not ask to go to the jury, and the only ruling requested was properly denied, the judgment must stand."

Upon the Record, under the authority of the Gray and Parker cases *supra*, the writ of error should be dismissed.

IV.

Lastly, on the merits, regardless of whether the train was interstate, the deceased clearly was not engaged in interstate commerce.

The test of whether the Federal Employers' Liability Act governs a particular action is whether the employee at the time of his injury or death was engaged in an act or service connected with and in the furtherance of interstate commerce. The character of the service of the other employees at the time is immaterial. It is likewise immaterial whether the employee injured or killed intended to engage in interstate commerce at a future time.

Pederson v. *L. & W. R. R. R. Co.*, 229 U. S. 146.

It was undisputed that the train was being made up in the yards at Kansas City, Missouri, on track No. 9

(Rec. p. 51), that deceased was killed while attempting to couple together cars on track No. 5 (Rec. pp. 22, 34, 51 and 66), that none of the cars on track No. 5 at the time were to be a part of the train and that all were to remain on that track (Rec. pp. 53, 54 and 81). These cars left on track No. 5 were empties and bad order cars (Rec. pp. 4, 80 and 103) and there was no evidence that any of them had been in interstate commerce or were intended for interstate commerce in the future.

It is immaterial that certain cars had been removed from track No. 5 and placed in train "53," and that the cars which were to remain there had been switched back and forth. The character of deceased's employment prior to the accident and the character of the employment of the other members of the switching crew at the time of the accident have nothing to do with the case. The sole question to be considered is the character of deceased's employment at the specific time he was killed.

At this time all of the cars intended for train "53" had been removed from track No. 5. Deceased was not engaged in switching the cars incident to the making up of the train, but was engaged in *coupling together the discards, on the track where they were to remain.* It was wholly immaterial, so far as the making up or movement of the train was concerned, whether the discards were coupled together. This is clear from plaintiff in error's own evidence.

Its foreman testified (Rec. p. 53):

> "Q. I will ask you whether you had given any signal to Mr. Small to go in on track No. 5, and couple these cars and shunt them in?

A. No, sir; no, sir.
Q. Was it necessary to have those cars coupled up on track No. '5'?
A. It was dead stuff, it was not necessary, no, sir; it was dead stuff, it was what stuff we were not going to use, they were all empties.
Q. They were cars that you were throwing out?
A. Throwing back in, we were going to leave them, we were not going to use them at all."

Its assistant yardmaster testified (Rec. p. 81):

"Q. Did you ever give Mr. Small any instructions about those empty cars switched in on track No. 5?
A. Yes, sir.
Q. What instructions did you give him?
A. He was to pay no attention to the cars as we were not going to us them on this track."

The facts of this case, therefore, clearly bring it under the decisions of this court in *Illinois Central R. R. v. Behrens*, 233 U. S. 473; *Erie R. R. Co. v. Welsh*, 37 Sup. Ct. Rep. 116 (not yet officially reported) and *Illinois Central R. R. Co. v. Perry*, 37 Sup. Ct. Rep. 122 (not yet officially reported).

A clearer example of the distinction pointed out in the Pederson case and these cases could not be found. It is manifest that, on the merits, the Federal Employers' Liability Act has no application to this action.

It is respectfully submitted that no Federal question was raised; that the questions brought here by the plaintiff in error are purely frivolous; and that the writ of error was taken merely for delay. Defendant in error respectfully urges that it be dismissed or the judgment be affirmed; and that she be awarded damages not exceed-

ing ten per cent upon the amount of the judgment, in accordance with paragraph two of Rule Twenty-three of the Supreme Court.

JOHN T. WAYLAND,
Attorney for Defendant in Error.

R. J. INGRAHAM,
L. E. DURHAM, and
HALE HOUTS,
On the Brief.

No. 760.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

MARGARET L. TABER, GUARDIAN OF HARRY H. SMALL, GRACE L. SMALL AND MARGARET G. SMALL, MINORS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

MOTION TO DISMISS OR AFFIRM AND BRIEF AND ARGUMENT IN SUPPORT OF SAID MOTION.

JOHN T. WAYLAND,
Attorney for Defendant in Error.

R. J. INGRAHAM,
L. E. DURHAM and
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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, Margaret L. Taber, guardian of Harry H. Small, Grace L. Small and Margaret G. Small, minors, and moves the Court in the alternative, either to dismiss the writ of error herein, or to affirm the judgment of the State Court for the following reasons, to-wit:

I.

This Court is without jurisdiction, because the claim of Federal right was not made or denied in the state court. The Missouri Supreme Court held that the question, whether the Federal Employers' Liability Act governed the action, was not raised in the manner required by the state practice, and refused to pass on it (Assignment of Errors, Record, pages 158 and 159). This decision is conclusive.

Spies v. *Ill.*, 123 U. S. 131.
Erie R. R. v. *Purdy*, 185 U. S. 148.
L. & N. R. R. v. *Woodford*, 234 U. S. 46.
C. M. & St. P. Ry. Co. v. *Hanson*, 235 U. S. 693.
Mip. St. P. & S. Ste M. Ry. Co. v. *Leora*, 235 U. S. 694.
St. L. & S. F. R. R. Co. v. *Shepherd*, 240 U. S. 240.

II.

No Federal question is raised for review by this Court, because the question whether deceased was engaged in interstate commerce at the time of his death was not submitted to the jury by the plaintiff in error.

L. & N. R. R. v. *Parker*, 37 Sup. Ct. Rep. 4.

III.

No Federal question is raised for review by this Court, because there was no evidence tending to show that the train which was being made up prior to the accident was an interstate train. Evidence that it was "a train for the West" and "a train westbound" is insufficient.

Osborne, Receiver, v. *Gray*, 241 U. S. 16.

IV.

Regardless of whether the train was interstate, the contention that deceased was engaged in interstate commerce at the time he met his death is frivolous. By the undisputed evidence of both parties, the task in which he was engaged was wholly immaterial to and disconnected with either the making up or movement of the train, and purely intrastate in character.

Illinois Central R. R. v. Behrens, 233 U. S. 473

Wherefore, defendant in error prays the Court to either dismiss the writ of error or to affirm the judgment of the state court and to adjudge to her just damages for the delay, and she submits herewith brief and argument in support of this motion.

.....

Attorney for Defendant in Error.

Kansas City, Missouri, January 18th, 1917.

NOTICE OF MOTION.

The plaintiff in error is hereby notified, that the defendant in error will on the 19th day of February, 1917, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as hearing may be had, submit for consideration of said court the within motion and brief in support thereof hereto attached; all of which are now served upon you herewith.

.....
Attorney for Defendant in Error.

Received a copy of the foregoing notice and motion with brief, thereto attached, by personal service thereof at Kansas City, Missouri, this 19 day of Jany 1917.

Signed { Edw. J White
Thos Hackney
Martin Lyons

Attorneys of Record for Plaintiff in Error.

BRIEF.

STATEMENT.

This is an action for the death of one Charles Small, while acting as switchman in the employ of the Missouri Pacific Railway Company, plaintiff in error, brought in the State Court of Missouri by the defendant in error, Margaret L. Taber, guardian for deceased's minor children. Deceased was attempting to adjust the coupler of a car in order that a coupling might be made, when other cars were, contrary to the customary way of doing the work, pushed against him without warning and he was crushed and instantly killed. The trial resulted in a judgment for Eight Thousand Dollars in favor of defendant in error.

The action was brought under the statutes of Missouri and tried on that theory. On oral argument in the State Supreme Court and in supplemental brief filed thereafter, plaintiff in error contended, for the first time, that the action was governed by the Federal Employers' Liability Act.

The Supreme Court of Missouri affirmed the judgment and plaintiff in error comes here contending that the action is governed by the Federal Act and that the judgment under the state law must be reversed.

Other material facts will be stated in the argument. The printed transcript of record is on file and is referred to herein.

ARGUMENT.

I.

Regardless of the facts, the claim that the Federal Act governed the action was not properly raised in the state court, and this Court has no jurisdiction.

The Supreme Court of Missouri held that the question whether deceased's employment, at the time of his death, was interstate, was not raised in the manner required by the Missouri practice, and refused to pass upon the question on its merits. This ruling clearly appears in the Assignment of Errors, as follows (Record, pages 158 and 159):

> "Now comes the Missouri Pacific Railway Company, a corporation, Plaintiff in Error, and makes and files this, its Assignment of Errors and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above entitled cause there is manifest error in this, to-wit:
>
> 1. Said Supreme Court of the State of Missouri erred in holding, adjudging and determining, as follows: "The Federal Statute, which the appellant now invokes is Section 8657 of the Compiled Statutes of 1913. So far as it is applicable to this case, it is as follows:
>
> 'Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the sur-

viving widow or husband and children of such employe * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.'

"No reason has been suggested why this petition does not state all the facts necessary to recovery by these children under the Missouri Statutes cited. That it does not state a cause of action in favor of the personal representative of the deceased under the Federal Statute is clear, for there is no statement of the vital fact, that the injury was inflicted while the defendant was engaging in interstate commerce between the states and territories and while the deceased was employed by it in such commerce. The State court having jurisdiction to entertain the action under both statutes, its proceedings must be judged by its own practice, which requires an answer which shall contain a statement of any new matter constituting a defense. R. S. 1806. It follows, from the statement in the petition of all the facts necessary to constitute a perfect cause of action under the state statute, that if it had sought to defeat it, by showing the additional facts that the injury was inflicted while the defendant was engaging in interstate commerce, and while the deceased was employed by it in such commerce, those facts should have been placed in the answer. This was the first step provided by the Missouri Code for presenting such matters for the determination of the court."

2. The said Supreme Court of the State of Missouri erred in holding, adjudging and determining as follows:

"At the trial it was stated in evidence that one of the objects of the work in which deceased was engaged was the making up of the train to go west to some destination not named and by some of the several lines of the defendant's railroad that crossed the western frontier of the state at various dis-

tances from Kansas City, and that certain cars bore initials, the meaning of which is not stated, but of which counsel for the defendant asks to take judicial notice. If this testimony tended to prove that the appellant and deceased were engaged in interstate commerce at the time of the injury, there was still an opportunity under the Missouri Code for the defendant to conform his answer to such evidence and to have the question submitted to the jury. Instead of doing this, he asked, and the court granted, its submission upon the theory inconsistent with the terms of the Federal Statute, that contributory negligence on the part of the deceased constituted a complete defense to the action. To raise the question upon appeal, the statute expressly requires (R. S. 1909, §2081) that it should appear in the record that it was submitted to the determination of the trial court, and was expressly decided against the appellant. There is nothing in the record indicating this. On the contrary, the appellant, after having availed himself of the defense of contributory negligence under the State Statute and lost, is now seeking to recede, because, for the purpose of gaining this advantage to which it was not entitled, it had concealed its real defense. The Employers' Liability Act bears none of the marks of having been enacted for any such purpose. Having digged this pit, it is appropriate that the appellant should have been the one to fall into it. The question of the application of the Employers' Liability Act, (Act April 22, 1908, c. 149, 35 Stat. 65; U. S. Comp. St. 1913, §§8657-8665) not having been decided by the trial court, no exception with respect to it can be taken here."

Whether or not a federal claim of right is properly raised in the state court, is a matter of state practice, and is for the decision of the state court of last resort.

N. C. R. R. v. *Zachary*, 232 U. S. 248, l. c. 257.

The decision of the Supreme Court of Missouri, that the claim was not properly made and the refusal of that court to consider it on its merits, is conclusive and this court will not assume jurisdiction.

Spies v. *Illinois*, 123 U. S. 131.
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C. M. & St. P. Ry. Co. v. *Hanson*, 235 U. S. 693.
M. St. P. & S. Ste. M. Ry. Co. v. *Leora*, 235 U. S. 694.
St. L. & S. F. R. R. Co. v. *Shepherd*, 240 U. S. 240.

The Hanson and Leora cases presented situations identical with that presented in this case. In those cases, the Supreme Court of Wisconsin, (146 N. W. 524 and 520), held, as did the Missouri Supreme Court in this case, that the question whether the deceased was engaged in interstate commerce was not properly raised and refused to consider it on its merits. In each case the railroad company sought a reviewal in this court and this court dismissed the writ of error by opinion *per curiam*.

On the authority of these cases, we submit that this writ of error should be dismissed.

II.

In the next place the writ of error should be dismissed for the reason, that, if there was evidence that deceased's employment at the time of his death was interstate in character, the question should have been submitted to the jury, and the railroad company having failed to

ask its submission, brings no question to this Court for review. This Court has very recently so held in the case of *L. & N. R. R. Co.* v. *Parker*, 37 Sup. Ct. Rep. 4 (not yet officially reported). Mr. Justice Holmes, for the Court, said (page 5):

> "But it is necessary to see how the case was dealt with in the trial court. The railroad company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce. It simply asked the court to direct a verdict, on the ground, among others, that it appeared as matter of law that he was so engaged. But if the question had been left to the jury, and they had disbelieved the testimony that the empty car was moved for the ulterior purpose of interstate commerce, there would have been no error of law in allowing a verdict for the plaintiff to stand. It is true that the judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary; and, as the railroad did not ask to go to the jury, and the only ruling requested was properly denied, the judgment must stand."

III.

In the third place, the question is not presented for review by this court, because, there was no evidence that the train, which was being made up prior to the accident was an interstate train.

The evidence relied upon by the plaintiff in error is the statements: that, it was "a train for the west." (Record, page 17); that it was "train 53" (Record, page 5); that, "We were making up train 53 on track No. 9,

westbound train * * * " (Record, page 96). The case of *Osborne, Receiver*, v. *Gray*, 241 U. S. 16; is directly in point. This court said (page 21):

> "It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the state. This contention we are unable to sustain. The make-up of the trains and the movement of cars are not matters which we may assume to know without evidence. The state court, with its intimate knowledge of the local situation, thought that such an assumption on its part would be wholly unwarranted, and we cannot say that it erred in this view. The fact that Chattanooga and its suburb, Alton Park, were near the state line did not establish that the cars had crossed it. The defendants knew the actual movements of the cars, and failing to inform the court upon this point cannot complain that they have been deprived of a federal right."

We submit that under authority of this case, alone, the writ of error should be dismissed.

IV.

Lastly, regardless of whether the train was interstate, the deceased was clearly engaged in intrastate service.

It was undisputed that the train was being made up in the yards at Kansas City, Missouri, on track "9" (Record 51), that deceased was killed while attempting to couple together cars on track "5" (Record 22, 34, 51, 66),

that none of the cars on track "5" at the time were to be a part of the train and that all were to remain on that track (Record 53, 54, 81). These cars left on track "5" were empties and bad order cars (Record, 4, 80, 103) and there was no evidence that any of them had been in interstate commerce or were intended for interstate commerce in the future.

It is immaterial that certain cars had been removed from track "5" and placed in train "53," and that the cars which were to remain there had been switched back and forth. The character of deceased's employment prior to the accident and the character of the employment of the other members of the switching crew at the time of the accident have nothing to do with the case. The sole question to be considered is the character of deceased's employment at the specific time he was killed.

At this time all of the cars intended for train "53" had been removed from track "5". Deceased was not engaged in switching the cars incident to the making up of the train, but was engaged in coupling together the discards, all intrastate, on the track where they were to remain. It was wholly immaterial, so far as the making up or movement of the train was concerned, whether the discards were coupled together. This is clear from plaintiff in error's own evidence.

The foreman testified (Record page 53):

> "Q. I will ask you whether you had given any signal to Mr. Small to go in on track No. 5, and couple these cars and shunt them in?
> A. No, sir; no, sir.

Q. *Was it necessary to have those cars coupled up on track No. 5?*
A. *It was dead stuff, it was not necessary, no, sir; it was dead stuff, it was what stuff we were not going to use, they were all empties.*
Q. *They were cars that you were throwing out?*
A. *Throwing back in, we were going to leave them, we were not going to use them at all."*

The assistant yardmaster testified (Record page 81):

"Q. Did you ever give Mr. Small any instructions about those empty cars switched in on track No. 5?
A. Yes, sir.
Q. What instructions did you give him?
A. *He was to pay no attention to the cars as we were not going to use them on this track.*

The facts of this case, therefore, clearly bring it under the decision of this court in *Illinois Central R. R. v. Behrens*, 233 U. S. 473. The Federal Act had no application to this action. Erie RR v Mich 37 Sup Ct Rep 1 All Cent RR v Mary " " " 6 "

It is respectfully submitted that no Federal question is presented for review by this Court, that it is manifest that the writ of error was taken for delay only and that the question brought here by the plaintiff in error is so frivolous as not to need further argument.

Defendant in error respectfully urges that the writ of error be dismissed or the judgment be affirmed, as prayed in her motion.

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Attorney for Defendant in Error.

R. J. INGRAHAM,
L. E. DURHAM and
HALE HOUTS,
On the Brief.